IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 443

INDIANA GAS & CHEMICAL CORPORATION,
Petitioner,

v.

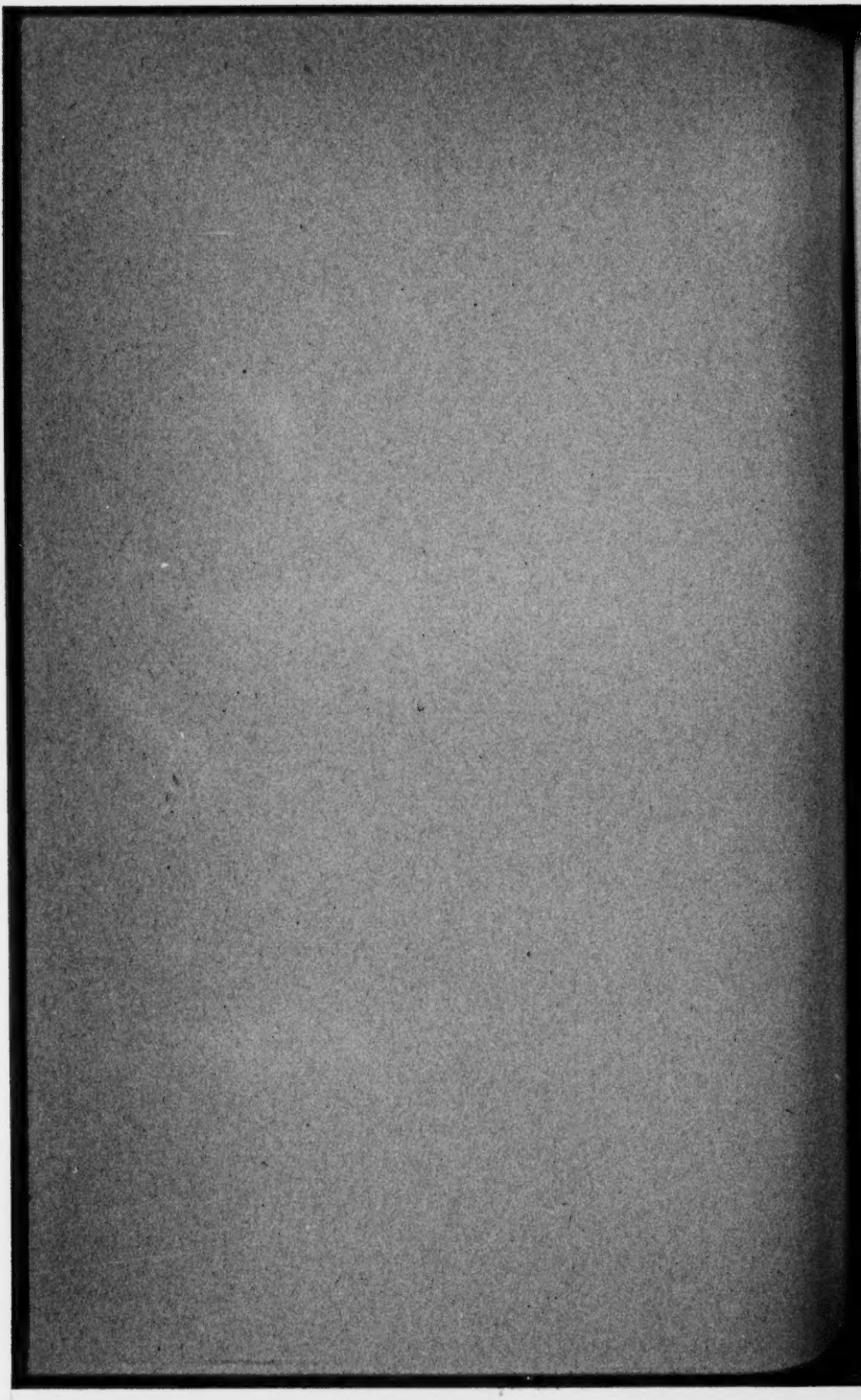
KENTUCKY NATURAL GAS CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT AND
SUPPORTING BRIEF

PAUL Y. DAVIS,
HARVEY B. HARTSOCK,
Attorneys for Petitioner.

FRANK C. DAILEY,
GEORGE S. DAILEY,
JAMES E. LEAK,
GUSTAV H. DONGUS,
1100 Hume-Mansur Building,
Indianapolis, Indiana,
Of Counsel.

C. B. Pursley & Co., Inc., Indianapolis



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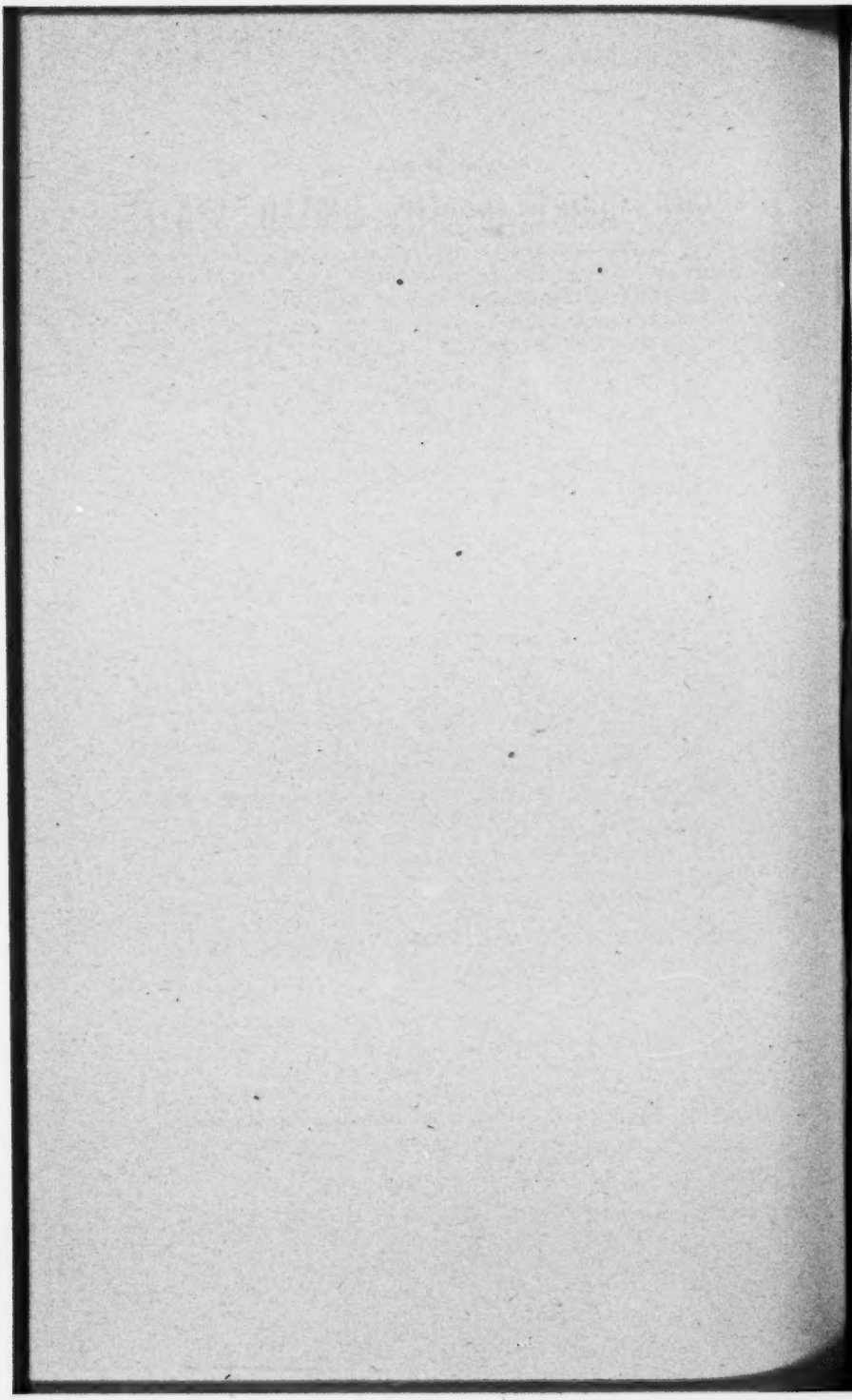

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No. ———

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND SUPPORTING BRIEF

May it Please the Court:

Your petitioner, Indiana Gas & Chemical Corporation, respectfully represents that:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED

This petition seeks review of the opinion and judgment of the United States Circuit Court of Appeals for the Seventh Circuit, rendered July 6, 1942, affirming a judgment of the United States District Court for the Southern District of Indiana, Indianapolis Division. The opinion is reported as *Kentucky Natural Gas Corporation v. Indiana Gas & Chemical Corporation*, 129 F. (2d) at page 17.

This suit was begun by respondent against the petitioner under Section 274d of the Judicial Code, as amended, (U.S.C.A. Title 28, Section 400) to obtain a declaratory judgment upon alleged rights growing out of a contract. R., p. 2. A money judgment was demanded upon two alternative theories together with an adjudication of the termination of the obligations of the parties under the contract. R., p. 7.

After trial without a jury, the Trial Court made a special finding of fact (R., pp. 45-71) and conclusions of law (R., pp. 71-72) upon which judgment (R., pp. 72-73) was rendered for respondent for $10,941.02 upon one of the alleged grounds for damages together with a declaration of the termination of contractual obligations as prayed by respondent.

Questions One and Two

Respondent as seller and petitioner as buyer were mutually bound in a contract (R., pp. 13-24) for the purchase and sale of petitioner's "requirements" of natural gas. R., p. 46, Ex.D. pp. 13-24. Petitioner had agreed that these requirements would reach a certain minimum. R., pp. 14-16. Respondent asserted a right to cancel this contract for alleged misrepresentation inducing its execution and also for alleged breach by petitioner. R., pp. 47-48. Thereafter respondent, professedly to avoid "interference with public convenience", (R., p. 10), furnished these requirements but asserted a right to receive 5 cents per MCF in excess of the contract price, (R., p. 56) not only for the "requirements" but also for the agreed minimum quantities. R., pp. 56-57. Petitioner at all times asserted a right to have all promises of the contract performed. R., p. 56. Petitioner received its actual requirements and paid the

contract price of 30 cents per MCF, but failed to purchase the agreed minimum by the total of 181,982 MCF. R., p. 56. Prior to the time petitioner's "requirements" began to fall short of the minimum, respondent through a wholly owned subsidiary (R., p. 47) also offered natural gas for sale to others (R., pp. 61-64) in territory in which it had agreed not to sell during the life of the contract. R., p. 19.

On this phase of the controversy the complaint asserted:

> (1) A right to cancel the contract for alleged breach, and consequent right to recover 5 cents per MCF ($30,913.10) in excess of the contract price for gas actually delivered. R., p. 7.
>
> (2) Alternatively, 30 cents per MCF for the alleged deficiency of 181,982 in the purchase of the minimum quantities prescribed in the contract. R., p. 7.

Respondent offered no evidence in support of its alleged right to cancel the contract (R., p. 48), but was awarded damages of $10,941.02 because of petitioner's failure to receive at 30 cents per MCF 181,982 MCF of gas which respondent was only willing to furnish at 35 cents per MCF. R., pp. 72, 73. The Circuit Court of Appeals affirmed.

Questions Three and Four

Because of termination of petitioner's two sales contracts measuring the "requirements," the "requirements" for which the controversial deliveries were made (Par. (a), (d), R., pp. 14, 15) had ceased before trial (R., pp. 47, 49-53) and deliveries to supply these "requirements" had therefore ceased (R., p. 55), but the contract provided for the supply of gas for other "requirements" to arise in the future. Par. (b), (c), R., p. 15. Respondent assert-

ed that by proper construction of the contract the discontinuance of deliveries wholly terminated the parties' contractual obligations. R., pp. 43-44. The judgment of the Trial Court adjudged the contractual obligations terminated. R., p. 72. The facts were found specially, and the Trial Court's determination upon this subject was not stated as a finding of fact but expressly as a conclusion of law. R., p. 71. Petitioner objected to this conclusion, and specifically to the Court's failure to adjudge the contract in force (R., p. 72), and assigned error thereon. R., p. 75. The Circuit Court of Appeals nevertheless affirmed, saying: "We must assume that the evidence upon which the court based its conclusion in this respect, which is not in the record, justified the finding." R., p. 94.

Contract provisions and findings relied upon for decision of the question thus ignored are in the footnote.[1]

---

1 The contract provisions pertinent to the question of termination of the contract are as follows:

The petitioner-buyer's "requirements" of natural gas which the respondent-seller agreed to supply until 1947 (Eighteenth, R., p. 23) are described in paragraph First (R., pp. 14-16) as follows:

(a) Requirements for supplying manufactured gas to Indiana Gas Utilities Company under petitioner's contract with that company dated August 24, 1929. R., p. 14.

(b) Requirements for supplying Indiana Gas Utilities Company with mixed or straight natural gas, after "change-over" to that type of supply. R., p. 15.

(c) Requirements for underfiring coke ovens, and boilers, and making reformed gas, after "change-over" by Indiana Gas Utilities Company. R., p. 15.

(d) Requirements for supplying manufactured gas to Universal Gas Company under petitioner-buyer's contract with that company dated September 1, 1935. R., pp. 15-16.

Paragraph Second provides that all contracts by petitioner-buyer or its vendee for selling gas to industrial consumers, should be approved by respondent-seller, and fixes a price of 80 percent of resale price for all gas resold to industrial consumers "by Buyer or said Indiana Gas Utilities Company." R., pp. 16-17.

Paragraph Sixth provides in part:

"Sixth. Seller shall not be obligated to supply natural gas to Buyer for use or sale either directly or indirectly for any purpose not specified in Section First or Second hereof."

Petitioner-buyer's contract of September 1, 1935, with Universal Gas Company terminated September 15, 1940. Finding 5, R., p. 47. Its contract of August 24, 1929, with Indiana Gas Utilities Company terminated November 18, 1939. Finding 8, R., pp. 49-55.

Questions Five and Six

The complaint had tendered issue, joined by the answer, as to whether or not petitioner had in fact committed a breach of contract antecedent to respondent's repudiation. R., pp. 3-5, 27-28. Upon respondent's failure to support this issue, the Trial Court, over petitioner's objection (R., p. 72) ignored it (R., pp. 71-72), and error was assigned upon the Trial Court's failure to make a declaration in petitioner's favor. R., p. 75. The Circuit Court of Appeals likewise failed to determine this issue except inferentially, by its determination (erroneous, we believe, for other reasons) that petitioner was liable in damages.

II.

JURISDICTION TO REVIEW THE JUDGMENT

Jurisdiction of the District Court as a federal court was founded upon Section 24 of the Judicial Code (U.S.C.A. Title 28, Section 41 (1)) in that the parties were corporate citizens of different states, and the matter in controversy exceeded $3,000. R., pp. 2, 45, 72. Jurisdiction of the Circuit Court of Appeals was founded on Judicial Code, Section 128 (U.S.C.A. Title 28, Section 223) and this Court has jurisdiction to review by virtue of Judicial Code Section 240, as amended, (U.S.C.A. Title 28, Section 347). The petition, the annexed brief and the record have been filed prior to October 6, 1942, and therefore within the three months prescribed by the Act of February 13, 1925, Chapter 229, Section 8, 43 Stat. 940, U.S.C.A. Title 28, Section 350, since the judgment of the Circuit Court of Appeals for the Seventh Circuit was entered July 6, 1942.

III.

QUESTIONS PRESENTED

(1) Whether or not, under applicable local law, the seller of goods under an executory contract of sale, may recover damages for the buyer's non-acceptance of a portion of the goods, although persistently unwilling to transfer the goods for the agreed price.

(2) Whether or not, under applicable local law, the seller of goods, under an executory contract of sale, having been guilty of an unqualified and unretracted repudiation, may nevertheless recover for the buyer's non-acceptance of a portion of the goods, because of the buyer's continued insistence upon performance of the seller's obligations.

(3) Whether or not, in a suit in a District Court of the United States under Section 274d of the Judicial Code (U.S.C.A. Title 28, Section 400), tried without a jury, where special findings of fact and separate conclusions of law were stated pursuant to Rule 52 of the Rules of Civil Procedure, and where one of the declarations sought and resisted was whether or not the parties' contractual obligations had been terminated, the Trial Court's conclusion of law, not stated as a finding of fact, that such obligations had terminated, and the consequent declaratory adjudication, was subject to review upon error duly assigned in the Circuit Court of Appeals, in the absence of the evidence.

(4) Whether or not, in a suit in a District Court of the United States under Section 274d of the Judicial Code (U.S.C.A. Title 28, Section 400), tried without a jury, where special findings of fact and separate conclusions of law were stated pursuant to Rule 52 of the Rules of Civil Pro-

cedure, and where one of the declarations sought and resisted was whether or not the parties' contractual obligations had been terminated, the Circuit Court of Appeals was required or permitted to treat as conclusive the Trial Court's conclusion of law that the contractual obligations of the parties had terminated, merely because the evidence was not in the record.

(5) Whether or not, in a suit for declaratory judgment under Section 274d of the Judicial Code (U.S.C.A. Title 28, Section 400), where plaintiff (respondent here) sought a declaration that a contract had terminated because of alleged breach by defendant (petitioner here), and issue was joined on the breach, and plaintiff failed at the trial to support this claim with evidence, the defendant was entitled to an adjudication denying plaintiff's right to terminate the contract for the alleged breach.

(6) Whether or not in a suit for declaratory judgment, tried without a jury, where special findings were made pursuant to Rule 52 of the Rules of Civil Procedure, the Circuit Court of Appeals was authorized to ignore error duly assigned upon the Trial Court's failure to adjudge and declare one issue in favor of defendant (petitioner), where plaintiff, having the burden, had failed to support its claim with evidence.

IV.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

(1) In deciding that respondent-seller, could recover from petitioner-buyer, for non-acceptance of a portion of the gas agreed to be bought and sold under the contract in suit, when respondent was at all times unwilling to

transfer title to this gas at the contract price, the Circuit Court of Appeals for the Seventh Circuit has erroneously decided an important question of the law of Indiana, involving the construction of Sections 42 and 64 of the Uniform Sales Act, (Burns' Annotated Indiana Statutes 1933, Sections 58-302, 58-502) in a way probably in conflict with the decisions of the Supreme Court of Indiana in *Schreiber v. Butler* (1882), 84 Ind. 576, 580, and *Magic Packing Co. v. Stone-Ordean Wells Co.* (1902), 158 Ind. 538, 542.

(2) If the provisions of Sections 42 and 64 of the Uniform Sales Act are not applicable, then the decision of the Circuit Court of Appeals, that the petitioner-buyer, was liable in damages for non-acceptance of a portion of the goods which respondent-seller, was at all times unwilling to transfer to petitioner at the contract price, is clearly in conflict with the decisions of the Supreme Court of Indiana in *Schreiber v. Butler* (1882), 84 Ind. 576, 580, and *Magic Packing Co. v. Stone-Ordean Wells Co.* (1902), 158 Ind. 538.

(3) If the question of petitioner's non-liability for damages under the facts found may be regarded as an open one under applicable Indiana law, then the decision that respondent-seller, although having repudiated the contract and been persistently unwilling to transfer title to the goods for the agreed price, might nevertheless recover for petitioner-buyer's non-acceptance of a portion of the goods, erroneously determined this question in conflict with the decision of this Court in *Norrington v. Wright* (1885), 115 U. S. 188, 212.

(4) If the question of petitioner's non-liability for damages under the facts found may be regarded as an open one under applicable Indiana law, then the decision that respondent-seller, although having repudiated the

contract and been persistently unwilling to transfer title to the goods for the agreed price, might nevertheless recover for petitioner-buyer's non-acceptance of a portion of the goods, because petitioner-buyer, at all times insisted upon its right to full performance, erroneously determined this question in conflict with the following decisions of other Circuit Courts of Appeals, namely:

Tri-Bullion Smelting Co. v. Jacobsen (C.C.A. 2, 1916), 233 Fed. 646, 649;

United Press Association v. National Newspaper Association (C.C.A. 8, 1916), 237 Fed. 547, 554;

Bu-Vi-Bar Petroleum Corporation v. Krow (C.C.A. 10, 1930), 40 F. (2d) 488, 491;

and with its own decision in *Lagerloef Trading Co. v. American Paper Products Co.* (C.C.A. 7, 1923), 291 Fed. 947, 955.

(5) In refusing to review the sufficiency of facts specially found to support the judgment adjudging the contractual obligations of the parties terminated, and in assuming the correctness of the Trial Court's conclusion to that effect, which was expressly stated as a conclusion of law and not as a finding of fact, the Circuit Court of Appeals erroneously disregarded the provisions of R. S. 700, U.S.C.A. Title 28, Section 875, and of Rule 52 of the Rules of Civil Procedure, and rendered a decision in probable conflict with decisions of this Court in *Sun Mutual Insurance Company v. Ocean Insurance Company* (1882), 107 U. S. 485, 500; *United States v. Pugh* (1878), 99 U. S. 265, 271; *Collins v. Riley* (1881), 104 U. S. 322, 327, and *French v. Edwards* (1874), 21 Wall. 147, 151.

(6) If R. S. 700, U.S.C.A. Title 28, Section 875, and decisions thereunder are no longer controlling by virtue

of the Rules of Civil Procedure, or because this was a suit for declaratory judgment, then the Circuit Court of Appeals has decided in a way probably erroneous, an important question of Federal Law arising under the Rules of Civil Procedure, which has not been, but should be, decided by this Court, namely: Where the Trial Court has made special findings of fact and separately stated conclusions of law under Rule 52, does absence of the evidence from the record preclude review of the sufficiency of the facts found to support the conclusions of law and resulting judgment?

(7) In failing to review the action of the Trial Court in refusing to pass upon and adjudicate the issue joined by respondent-plaintiff's complaint and petitioner-defendant's answer as to whether or not petitioner had been guilty of a breach of the contract in suit justifying its termination by petitioner, the Circuit Court of Appeals decided *sub silentio* an important question under the Federal Declaratory Judgments Act, which should be settled by this Court, in a way believed to be erroneous and in probable conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in *National Pigments & Chemical Co. v. C. K. Williams & Co.* (C.C.A. 8, 1938), 94 F. (2d) 792, 796.

(8) In failing to pass upon and decide the issue raised by petitioner's fifth assignment of error (Point 5, R. 5) that the Trial Court erred in failing to adjudge petitioner not guilty of breach of contract, the Circuit Court of Appeals rendered a decision in probable conflict with decisions of this Court in

Buzynski v. Luckenbach Steamship Company (1928), 277 U. S. 226, 228;

Maryland Casualty Co. v. Jones (1929), 279 U. S. 792, 796.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full, true and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 7960, entitled *"Kentucky Natural Gas Corporation, Plaintiff-Appellee, v. Indiana Gas & Chemical Corporation, Defendant-Appellant,"* and that the judgment of the United States Circuit Court of Appeals for the Seventh Circuit in said case may be reversed by this Court, that the award of damages against your petitioner be set aside and that this Court hear and determine the issues left undetermined by said Circuit Court of Appeals or that said cause be remanded to the Circuit Court of Appeals with instructions to hear and determine such undetermined issues, and that your petitioner may have such other and further relief in the premises as to this Court may seem meet and just; and your petitioner will ever pray.

INDIANA GAS & CHEMICAL CORPORATION,

By PAUL Y. DAVIS,

HARVEY B. HARTSOCK,

Attorneys for Petitioner.

FRANK C. DAILEY,

GEORGE S. DAILEY,

JAMES E. LESH,

GUSTAV H. DONGUS,

1100 Hume-Mansur Building,

Indianapolis, Indiana,

Of Counsel.

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Respondent.
No. ——

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

THE OPINION OF THE COURT BELOW

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit is found in the record at pages 89 to 94. It is reported as *Kentucky Natural Gas Corporation v. Indiana Gas & Chemical Corporation* (C.C.A. 7, 1942), 129 F. (2d) 17.

II.

JURISDICTION TO REVIEW THE JUDGMENT

This Court has jurisdiction to review the judgment by virtue of Judicial Code Section 240, as amended (U.S.C.A. Title 28, Section 347). The annexed petition, this brief and the record have been filed prior to October 6, 1942, and therefore within the three months prescribed by the Act of February 13, 1925, Chapter 229, Section 8, 43 Stat. 940, U.S.C.A. Title 28, Section 350, since the judgment of the Circuit Court of Appeals for the Seventh Circuit was entered July 6, 1942.

III.

STATEMENT OF THE CASE

The following additional statement is necessary to full presentation of the questions involved:

The contract in suit was executed as part of a plan of reorganization of petitioner's predecessor approved by the United States District Court for the Southern District of Indiana (R., pp. 46-47) and gas deliveries thereunder were made, and to be made, at Terre Haute, Indiana. R., p. 14.

Section 42 and the applicable portion of Section 64 of the Uniform Sales Act in force in Indiana since 1929, read as follows:

> "Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions; that is to say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price and the buyer must be ready and willing to pay the price in exchange for possession of the goods."

Indiana Acts 1929, Ch. 192, Section 42, p. 644; Burns' Anno. Ind. Stat. 1933, Section 58-302.

"(1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for nonacceptance."

Indiana Acts 1929, Ch. 192, Section 64, p. 654; Burns' Anno. Ind. Stat. 1933, Section 58-502.

SUMMARY OF THE ARGUMENT

I.

The Circuit Court of Appeals erroneously refused to follow and apply applicable statutes and decisions of the State of Indiana.

A. Since the contract was made under the jurisdiction of an Indiana court (R., pp. 46-47) and was performable in Indiana (R., p. 14), the right of the respondent-seller to recover damages for petitioner-buyer's non-acceptance of a portion of the goods contracted to be sold was governed by the law of Indiana.

Scudder v. Union National Bank (1875), 91 U. S. 406, 413;

2 Beale, *Conflict of Laws,* Sec. 370.1, p. 1272.

B. Prior to the enactment of the Uniform Sales Act, it was the established law of Indiana that a seller's will-

ingness (as well as ability) to perform the contract was a condition precedent to his recovery of damages for buyer's non-acceptance.

Schreiber v. Butler (1882), 84 Ind. 576, 580;

Magic Packing Co. v. Stone-Ordean Wells Co. (1902), 158 Ind. 538.

C. The Uniform Sales Act, in force in Indiana since 1929, not only does not abrogate, but on the contrary expressly and specifically codifies this rule, providing that the seller must be "ready and willing to give possession of the goods to the buyer *in exchange for the price,*" and gives the seller a right of action for non-acceptance only when the buyer "*wrongfully* neglects or refuses to accept and pay for the goods." (Our emphasis.)

Indiana Acts 1929, Chapter 192, Sections 42 and 64, pages 644, 654; Burns' Anno. Ind. Stat. 1933, Sections 58-302, 58-502, quoted *ante*, pp. 13-14.

D. The findings show that during the period May, 1939, to December, 1940, when the petitioner failed to take minimum quantities of gas, the respondent-seller was *never* willing to transfer title to the gas at the agreed price of 30c per MCF, but on the contrary demanded 35c per MCF not only for the gas which petitioner-buyer actually received, but also for the additional necessary to make up the agreed minimum, so that the petitioner has been mulcted in damages for not receiving at 30c per MCF gas which the respondent-seller was never willing to deliver at less than 35c.

Findings 6 and 13, R., pp. 47-48, 56-57.

II.

The decision that a defaulting seller, after a total and unretracted repudiation, persistently unwilling to perform the contract in any particular or to deliver the goods for the agreed price, and guilty of affirmative acts in violation of the contract, might nevertheless recover damages on account of the buyer's non-acceptance of a portion of the goods merely because the buyer refused to accede to the wrongful repudiation and demanded continued performance, is in conflict with applicable decisions of this Court, is contrary to the decisions of other Circuit Courts of Appeals, and contrary to the weight of authority.

A. It is elementary that one who sues upon a contract is bound to show such performance on his own part as entitles him to demand performance from the other.

Norrington v. Wright (1885), 115 U. S. 188, 205, 212;

Skehan v. Rummel (1890), 124 Ind. 347;

Rice v. Fidelity & Deposit Co. (C.C.A. 8, 1900), 103 Fed. 427, 433.

B. Respondent's offer to deliver gas, but not under the contract (R., p. 48) and delivery thereof at a price five cents higher than the contract price (R., p. 57) was not a performance of the contract, but was itself a breach of contract.

Ripley v. McClure (1849), 4 Exch. 345, 359, 360; 154 Eng. Rep. 1245;

Rubber Trading Company v. Manhattan Rubber Mfg. Co. (1917), 221 N. Y. 120, 116 N. E. 789, 790;

5 Williston Contracts (Rev. ed.), Sec. 1294.

C. By the weight of authority, especially in Circuit Courts of Appeals, the petitioner-buyer, notwithstanding continued insistence upon respondent's performance of the contract, might have recovered any damages consequent upon respondent's unlawful repudiation, without further performance on petitioner's part.

Tri-Bullion Smelting Co. v. Jacobsen (C.C.A. 2, 1916), 233 Fed. 646, 649;

United Press Association v. National Newspaper Association (C.C.A. 8, 1916), 237 Fed. 547, 554;

Bu-Vi-Bar Petroleum Corporation v. Krow (C.C.A. 10, 1930), 40 F. (2d) 488, 491, 69 A.L.R. 1295, and Annotation, pp. 1303-1310.

Indeed this rule is established by the Circuit Court of Appeals for the Seventh Circuit.

Lagerloef Trading Co. v. American Paper Products Co. (C.C.A. 7, 1923), 291 Fed. 947, 955.

A fortiori, petitioner's continued insistence that it had a right to full performance did not render petitioner as a defendant liable in damages for non-performance of that which would have been excused petitioner as a plaintiff.

5 Williston Contracts (Rev. ed.), Sec. 1334.

D. The dictum of *Roehm v. Horst* (1900), 178 U. S. 1, 11, that a promisee who fails to treat anticipatory repudiation (anterior to the time of performance) as a breach "putting an end to the contract," thereby "keeps the contract alive for the benefit of both parties," if applicable where the repudiation occurs during performance, obviously does not mean that by so keeping the contract alive the promisee endows the repudiator with power to recover without performance on the repudiator's part.

III.

In refusing to review the sufficiency of facts specially found to support the judgment adjudging the contractual obligations of the parties terminated, and in assuming the correctness of the Trial Court's conclusion to that effect, which was expressly stated as a conclusion of law and not as a finding of fact, the Circuit Court of Appeals erroneously disregarded the provisions of R. S. 700, U.S.C.A. Title 28, Section 875, and of Rule 52 of the Rules of Civil Procedure, and rendered a decision in probable conflict with decisions of this Court.

A. Under R. S. 700, applicable "when an issue of fact in any civil cause in a district court is tried and determined by the court without the intervention of a jury," rulings of the court may be reviewed upon appeal and "when the finding is special the review may extend to the sufficiency of the facts found to support the judgment."

R. S. 700, U.S.C.A. Title 28, Sec. 875.

B. Rule 52(a) of the Rules of Civil Procedure for District Courts requires special findings together with *separate* statement of conclusions of law.

Rules of Civil Procedure, Rule 52(a).

C. While the precise question has not arisen in this Court since the adoption of the Rules of Civil Procedure, this Court has uniformly held with respect to review on special findings under R. S. 700, review on special verdicts, review on special findings made by the Court of Claims, and review on special findings in admiralty cases, that the sufficiency of the *facts* found to support the judgment or

conclusions can neither be aided nor diminished by reference to the evidence.

Sun Mutual Insurance Company v. Ocean Insurance Company (1882), 107 U. S. 485; 500;

United States v. Pugh (1878), 99 U. S. 265, 271;

Miller v. Brooklyn Life Insurance Company, (1870), 12 Wall. 285;

Collins v. Riley (1881), 104 U. S. 322, 327.

IV.

Since the Declaratory Judgments Act (Jud. Code 274d, U.S.C.A. Title 28, Section 400) expressly authorizes declaration of rights, whether other or further relief can be awarded, and such a declaration is prospective and may operate as *res adjudicata,* the fact that adjudication of the first alternative issue tendered by plaintiff (respondent) was unnecessary to the relief actually granted by the District Court, did not obviate the duty of either the District Court or the Circuit Court of Appeals to adjudicate this issue.

National Pigments & Chemical Co. v. C. K. Williams & Co. (C.C.A. 8, 1938), 94 F. (2d) 792, 796.

V.

Unexplained failure of the Circuit Court of Appeals to pass upon an assignment of error as to the sufficiency

of the facts found to support the judgment is ground for reversal on certiorari in this Court.

Buzynski v. Luckenbach Steamship Company (1928), 277 U. S. 226, 228;

Maryland Casualty Co. v. Jones (1929), 279 U. S. 792, 796.

ARGUMENT

The Judgment for Damages

With all due respect to the learned courts below, the adjudication that petitioner-buyer should pay damages to respondent-seller for failing to accept and pay 30c per MCF for gas which the seller never offered except upon condition that petitioner pay 35c per MCF therefor, somewhat resembles something from Alice in Wonderland, and there is a similar difficulty in ascertaining and attacking the premises upon which it is based.

Petitioner has been held liable in damages for breach of an executory promise to receive and pay for goods, i.e., for non-acceptance of goods sold. By Section 64 of Indiana's Uniform Sales Act such liability arises only upon *wrongful* refusal to accept. But the same Act, defining the seller's obligation of delivery (Sec. 42, *ante* p. 13) prescribes that the seller must be ready and willing to transfer the goods "in exchange for the price." It is true that this is said with respect to "delivery" as a condition *concurrent* with "payment."

Here "delivery" was condition precedent to an obligation to pay on the 20th of the following month (R., p. 20), but no reason suggests itself why the credit period should make a tender conditioned upon future payment of an excessive price a sufficient discharge of the seller's obligation, when clearly it would not be so if credit had not been extended.

We submit, therefore, that the Circuit Court of Appeals has erroneously failed to follow the Uniform Sales Act of Indiana.

If for any reason the Uniform Sales Act is deemed inapplicable, the decision is equally incongruous with decisions at common law, both in Indiana and elsewhere. That a seller seeking recovery for the buyer's non-acceptance must have been ready, able and *willing* to deliver *under the contract* is as old as the remedy by special assumpsit, the declaration in which reads in part: " * * * and although the said plaintiff * * * was ready and willing, and then and there tendered and offered to deliver the said goods to the said defendant, and then and there requested the defendant to accept the same, *and to pay him for same as aforesaid,* yet the said defendant, not regarding his said promise and undertaking * * *" etc. II Chitty, Pleading (10th Am. Ed. 1847), p. 264. (Italics ours.)

Scarcity of cases directly affirming such an elementary proposition, does not detract from its force, and the principle is clearly recognized in the Indiana cases of *Schreiber v. Butler,* 84 Ind. 576, 580, and *Magic Packing Packing Co. v. Stone-Ordean Wells Co.,* 158 Ind. 538, 542. Indeed, the distinguished draughtsman of the Uniform Sales Act does not suggest that Section 42 has in this respect changed or added to the common law of any jurisdiction. 2 Williston, Sales (2nd ed), Section 448, et seq. In Indiana, moreover, as almost universally elsewhere, one seeking recovery upon an executory bilateral contract must both allege and prove his own performance or an excuse for non-performance.

Skehan v. Rummel, 124 Ind. 347, 24 N. E. 1089;

Norrington v. Wright, 115 U. S. 188, 212;

Rice v. Fidelity & Deposit Co. (C.C.A. 8th), 103 Fed. 427, 433.

Moreover, the seller's obligation is not discharged by mere physical tender of the goods, accompanied by de-

mands for an exchange performance different and more burdensome than that promised by the buyer. It was so decided in *Ripley v. McClure* (1849), 4 Exch. 345, 359, 360, 154 Eng. Rep. 1245, where it was held that the seller's tender of the proper goods upon unwarranted conditions was so far a breach as to permit the buyer to recover for non-delivery without proving his own performance. In *Rubber Trading Company v. Manhattan Rubber Mfg. Co.* (1917), 221 N. Y. 120, 116 N. E. 789, 790, the Court of Appeals of New York, speaking through Judge, later Mr. Justice Cardozo, said:

> "A tender, burdened with the condition that inspection must first be made, and satisfaction stated, was not a tender which answered the requirements of the contract."

Under these decisions, not only was petitioner excused for its failure to receive and pay for all the gas, but such failure would not have barred an action by petitioner for damages consequent upon respondent's breach.

The decision of the Circuit Court of Appeals is only explainable on what is believed to be a patent misapplication of the somewhat ambiguous dictum of *Roehm v. Horst,* 178 U. S. 1, 11, where this Court, stating a rule presumably applicable to so-called anticipatory breach (repudiation anterior to the time of performance) announced that one who fails to treat such repudiation as a breach "putting an end to the contract" thereby "keeps the contract alive for the benefit of both parties." But to say the petitioner's refusal to accede to respondent's wrongful termination, "kept the contract alive," is not to say that is was "kept alive" *minus* the obligation of respondent-seller to perform the contract, so as to entitle respondent to recover for non-

acceptance of gas which respondent was persistently unwilling to deliver at the contract price. While true that the English, and a minority of American decisions hold that an *anticipatory* repudiation, not acted upon, does not afford the injured party, as plaintiff, an excuse for non-performance of conditions precedent to his own recovery, the majority rule is that "the repudiation though not taken advantage of as a cause of action is, nevertheless, unless withdrawn, operative as a continuing excuse for the failure of the injured party to perform or to be ready and willing to perform. The excuse should be operative without more as a bar to an action by a party whose repudiation stands unwithdrawn, * * *."

5 Williston, Contracts (Rev. Ed.), Section 1334, pp. 3748-49.

The following cases from Circuit Courts of Appeals, including one from the Circuit Court of Appeals for the Seventh Circuit, clearly recognize that the repudiation, unwithdrawn, operates as a continued excuse for the injured party's non-performance, so as to enable him, notwithstanding continued insistence upon the wrongdoer's repentance, to recover of the repudiator without further performance.

Tri-Bullion Smelting Co. v. Jacobsen (C.C.A. 2, 1916), 233 Fed. 646, 649;

United Press Association v. National Newspaper Association (C.C.A. 8, 1916), 237 Fed. 547, 554;

Bu-Vi-Bar Petroleum Corporation v. Krow (C.C. A. 10, 1930), 40 F. (2d) 488, 491, 69 A.L.R. 1295, and Annotation pp. 1303-1310;

Lagerloef Trading Co. v. American Paper Products Co. (C.C.A. 7, 1923), 291 Fed. 947, 955.

The statement of Professor Williston that the excuse "should be operative without more as a bar to an action by a party whose repudiation stands unwithdrawn," would seem to follow *a fortiori*. Certainly it is a most fantastic result to conclude that respondent's wrongful and persistent repudiation of the contract or petitioner's rightful insistence upon its withdrawal *excused respondent* from the obligation to deliver gas *at the contract price* which otherwise would have been condition precedent to respondent's recovery for non-acceptance.

The Circuit Court of Appeals Erred in Refusing to Review the Correctness of the Trial Court's Conclusion of Law that the Parties' Contractual Relations Had Terminated.

This was plainly a question of law, requiring for its decision only (a) interpretation of the contract, and (b) application of its terms to the *facts found*. The Trial Court stated its special finding of *facts*, and stated separately its "conclusion of law" number 2 that "The contract between the plaintiff and defendant of September 1, 1935, was fully and completely terminated on December 31, 1940." R., p. 71. This was plainly not a "Finding of Fact" within the meaning of Rule 52 of the Rules of Civil Procedure, and was just as plainly not intended as such. The specific mandate of Rule 52 that the court "shall state separately its conclusions of law," is rendered nugatory and meaningless if the Appellate Court may treat a conclusion of law so stated as a finding of fact, and thereby assume the correctness of the judgment based thereon. Such procedure would necessarily preclude review of the sufficiency of the finding of facts to support the judgment, except in the rare case where court and counsel might be wholly unable to phrase a sufficient conclusion.

Prior to the adoption of the Rules of Civil Procedure, parties at an action at law tried to the court after proper waiver of jury, might review the sufficiency of facts found to support the judgment, and this right of review was unembarrassed by reference to or absence of the evidence. Under the Act of 1865, which became R. S. 700 (U.S.C.A. Title 28, Section 875), such a special finding is equivalent to the special verdict of a jury.

Sun Mutual Insurance Company v. Ocean Insurance Company (1882), 107 U. S. 485, 500.

In *Collins v. Riley* (1881), 104 U. S. 322, 327, after entry of judgment for Riley upon a special verdict this Court stated the question presented as follows:

> "The inquiry, therefore, is not whether the facts stated prevent the court from entering a judgment in favor of Riley, in pursuance of a general finding for him, but whether the facts stated—'this state of facts as to the interest of Polly Wagoner'—affirmatively establish his right to any judgment against the present defendants for the recovery of that interest."

At least as early as 1874, this Court clearly distinguished between a trial court's finding of fact and conclusion of law. In reversing a judgment in ejectment, based upon a special finding of facts and a conclusion of law that title was in certain trustees, rather than in plaintiff, the Court said:

> "If it had been one of the facts found by the court below, that the title was still in the trustees, the case would have presented a different aspect.

It is stated only as a conclusion of law, arising upon the facts found. Such findings of facts are regarded in this court in the light of special verdicts. 'If a special verdict on a mixed question of fact and law, find facts from which the court can draw clear conclusions, it is no objection to the verdict that the jury themselves have not drawn such conclusions, and stated them as facts in the case.' The presumption of the reconveyance arises here, with the same effect upon the specific findings, as if it had been expressly set forth as one of the facts found.

The conclusion of law that the title was still in the trustees was, therefore, a manifest error."

French v. Edwards (1874), 21 Wall. 147, 151.

In 1865 this Court adopted a rule applicable to trials in the Court of Claims very similar to Rule 52 of the Rules of Civil Procedure in requiring findings of fact and a separate statement of conclusions of law. 2 Wall. vii. In *United States v. Pugh* (1878), 99 U. S. 265, 271, these rules were interpreted as follows:

"The rule relieves us from the necessity of considering the evidence at all, and confines our attention to the legal effect upon the rights of the parties of the facts proven as they have been sent up from the court below. In this way the weight of the evidence is left for the sole consideration of the court below, but the ultimate effect of the facts which the direct evidence has established is left open for review here on appeal."

The Act of February 16, 1875, c. 77, U.S.C.A. Title 28, Sections 771, 772, required District Courts sitting in Ad-

miralty to "state the facts and conclusions of law separately." In *Sun Mutual Insurance Company v. Ocean Insurance Company* (1882), 107 U. S. 485, applying this statute, said:

> "The findings of fact being in the nature of a special verdict, we can go neither behind nor beyond them. We cannot correct them by inquiring into the evidence, nor supply any omissions by intendment or inference." (Page 500.)

With this historical background, we submit that the Circuit Court of Appeals erred in refusing to review the sufficiency of the facts found to support the conclusion and judgment of the trial court that the contractual relations of the parties terminated December 31, 1940, and in giving controlling force to the Court's conclusion of law on the erroneous presumption that the evidence "justified the finding." There is every reason to conclude that the new Rules of Civil Procedure adopted and did not change the practice prevailing theretofore in cases tried by the Court, where special findings were made.

The Circuit Court of Appeals Erred in Leaving Undecided the Question of Respondent's Right to Cancel the Contract for Petitioner's Alleged Breach.

The first and primary objective of respondent's suit was a declaration that respondent had justifiably terminated the contract for petitioner's alleged breach. Respondent failed to support this claim with proof but it did not dismiss. Had it sought to dismiss, the dismissal would have been an adjudication in petitioner's favor, unless by special leave of Court. Rules of Civil Procedure, Rule 41. The failure of both the District Court and the Circuit Court of Appeals

to decide this issue has left it in the same situation as though such leave had been granted, and petitioner, though entitled to prevail on such issue, is left to relitigate the question, not only in actions already pending (e.g., *Kentucky Natural Gas Corporation v. Indiana Gas & Chemical Corporation* (C.C.A. 7, 1941), 118 F. (2d) 831), where it is now material; but also wherever and whenever the controversy may arise.

Presumably both courts left the issue undecided because of the adjudication (we submit an erroneous one) that the contract had terminated from another cause; and because its determination was not necessary to the granting of other relief. If declaratory relief is to be withheld because issues upon which declaration is sought, though presently and actively in controversy, are not determinative of the immediate and coercive relief awardable, then declaratory judgments, as such, are effectively abolished. The proper view of declaratory relief under the Federal Act is, we submit, that taken by the Circuit Court of Appeals for the Eighth Circuit in *National Pigments & Chemical Co. v. C. K. Williams & Co.*, 94 F. (2d) 792, at pages 796-797, where the Court said:

> "In view of the failure of proof to sustain the violations alleged in the notice of October 12, 1934, it is unnecessary to decide that question for the purpose of settling the present controversy. But, since the decree in this suit is a declaratory judgment, prospective as well as retrospective in its implications, it may be regarded as res judicata as to future controversies. Therefore the decree should be modified to correct any errors which are pointed out on this appeal."

The Circuit Court of Appeals for the Seventh Circuit has not directly taken a contrary position, but has simply refused to decide the question of petitioner's right to declaratory judgment in its favor, by ignoring petitioner's fifth assignment of error. R., p. 75. This alone has been recognized as ground for reversal of the judgment on certiorari.

Buzynski v. Luckenbach Steamship Company (1928), 277 U. S. 226, 228;

Maryland Casualty Co. v. Jones (1929), 279 U. S. 792, 796.

We urge, therefore, that the writ of certiorari should issue, that the judgment of the Circuit Court of Appeals should be reversed, that the cause should be remanded with instructions to reverse the judgment of the District Court awarding damages against petitioner, with directions to enter declaratory judgment that petitioner had not been guilty of breach of contract justifying cancellation, and with directions to hear and determine the issue as to termination of the contract, unless this Court shall see fit to determine such issue on the record on certiorari.

Respectfully submitted,

PAUL Y. DAVIS,
HARVEY B. HARTSOCK,
Attorneys for Petitioner.

FRANK C. DAILEY,
GEORGE S. DAILEY,
JAMES E. LESH,
GUSTAV H. DONGUS,
1100 Hume-Mansur Building,
Indianapolis, Indiana,
Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 443

INDIANA GAS & CHEMICAL CORPORATION,
Petitioner,

v.

KENTUCKY NATURAL GAS CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

HARRY T. ICE,
MERLE H. MILLER,
Attorneys for Respondent.
ROSS, MCCORD, ICE & MILLER,
Of Counsel,
951 Consolidated Building,
Indianapolis, Indiana.

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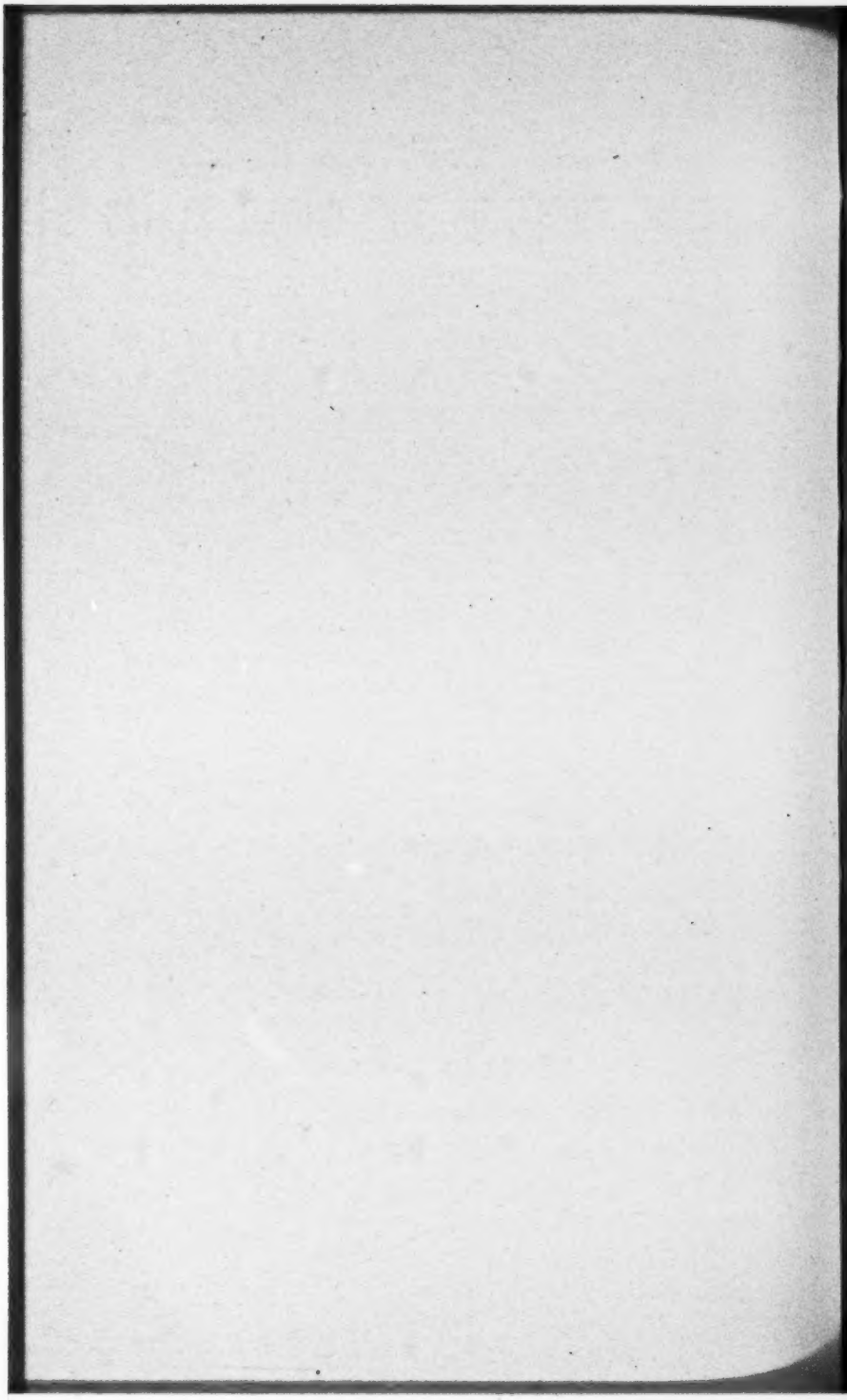

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The petition should be dismissed for failure to include "all that is material to the consideration of the questions presented" (*Rule 27(c) of this Court*). Many facts material to the case are not found in either the petition or brief.

Also, the petition should be dismissed upon the merits. No constitutional questions or questions of public policy are presented, and those questions of law presented were correctly decided.

* Reported below in 129 Fed. (2d) 17.

SUMMARY OF ARGUMENT

(a) The Record

The action is for declaratory judgment touching the rights of Kentucky Natural Gas Corporation,* respondent, and Indiana Gas and Chemical Corporation,** petitioner, under contract dated September 1, 1935. The contract provided for the supply of natural gas *for specific purposes* by respondent to petitioner.

Respondent prayed, the petitioner answered, and the Courts ruled as follows:

1. (a) *The complaint asked* that the rights and legal relations of respondent under the contract be determined, and that the Court state whether the contract was terminated on either (a) December 7, 1938; (b) November 18, 1940; (c) December 31, 1940; and has since any of said dates been in force. (R.*** 7, 39, 43-44.)

(b) *Petitioner denied* that the contract was terminated on any of said dates, but *petitioner did shut off the supply of gas on December 31, 1940.* On the trial, respondent abandoned any claim of termination on December 7, 1938, and no evidence was submitted in support of it. (R. 61, 48.)

(c) *The District and Circuit Courts ruled with respondent* that the contract was terminated on

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* Sometimes referred to as Kentucky Natural.
** Sometimes referred to as Indiana Gas.
*** R. refers to record page.

December 31, 1940, and since that date was not in force. (R. 72.)

2. (a) *The complaint asked* that if the contract was terminated on December 7, 1938, then the Court determine the amount of the balance due on gas at 35c per M. C. F. furnished after that date. (The contract rate was 30c per M. C. F.)

(b) *Petitioner denied* that there was a right to collect for gas at the rate of 35c per M. C. F. On the trial respondent abandoned this claim and submitted no evidence in support of it. (R. 48.)

(c) *Neither the District nor Circuit Court entered a ruling* upon this point.

3. (a) *The complaint asked* for the amounts due respondent since April 1, 1939, to the date of any termination of the contract, and if not terminated to the date of judgment, for failure of respondent to take the minimum provided for in the contract. (R. 7, 39, 43-44.)

(b) *Petitioner denied* that any sums were presently due for the minimums provided for in the contract, *but admitted that at the end of the contract, damages for failure to take the minimums would be due.* (R. 32.)

(c) *The District Court awarded and the Circuit Court affirmed judgment* for respondent for $10,941.02 as the damages to which it was entitled for the failure of the petitioner to take and pay for the minimums prescribed in the contract from

April 1, 1939, to December 31, 1940, the termination date fixed by the Court. (R. 73.)

4. (a) *The complaint asked* that if the contract was not terminated, the Court declare that the clause prohibiting the sale of gas by respondent in certain territory was in restraint of trade and therefore void, and particularly after December 31, 1940, when no further deliveries of gas were made under the contract. (R. 7, 43-44.)

(b) *Petitioner denied* that the agreement was in restraint of trade, but if so, that respondent was *in pari delicto* and so entitled to no declaration on the point. (R. 34.)

(c) *Neither the District Court nor the Circuit Court entered a ruling* on this request because the contract in its entirety was declared to be no longer in force after December 31, 1940.

(b) The Facts

Respondent, Kentucky Natural, entered into a contract dated September 1, 1935, with petitioner, Indiana Gas, by which respondent agreed to supply to petitioner natural gas for *certain specific purposes.*

Respondent produces, transports and sells natural gas. Its pipe lines connect with fields in Kentucky, Illinois and Indiana, and run north to Terre Haute and twenty miles beyond to the line of the Michigan Gas Transmission connecting with gas fields in Texas and Oklahoma.

Petitioner operates a coke and by-products plant at Terre Haute. At the time of the execution of this contract, petitioner had by virtue of assignment a contract for supplying manufactured gas to the Terre Haute district through Indiana Gas Utilities which owned the distribution lines in the Terre Haute district.

The contract recited that it was contemplated that petitioner would enter into a new contract *with Indiana Gas Utilities* covering the furnishing of either a mixed gas or straight natural gas. Respondent agreed to deliver to petitioner *"pending the changeover by said Indiana Gas Utilities"* from manufactured to mixed or straight natural gas, natural gas for the purpose of producing manufactured gas which petitioner was required *"under its present contract dated August 24, 1929, with said Indiana Gas Utilities"* to supply for distribution in the Terre Haute district. In addition, petitioner to purchase at least 500 cubic feet of natural gas for each 1,000 cubic feet of manufactured gas sold *to Indiana Gas Utilities* and Universal Gas Company. The price fixed was 30c per M. C. F. Other provisions of the contract provided for the supply of gas after the changeover to mixed gas or natural gas in the Terre Haute district *by Indiana Gas Utilities,* and the supply of gas under a contract with Universal Gas Company. The agreement provided that respondent was not obligated to furnish natural gas to petitioner for use or sale "either directly or indirectly for any purpose" not specified in the agreement. Respondent was not to sell to others within three miles of the Terre Haute district. The contract expired October 31, 1947, unless sooner cancelled.

The contract between petitioner and *Indiana Gas Utilities* was cancelled on November 18, 1940. Respondent on hearing of the cancellation, notified petitioner that on January 3, 1941, it would terminate deliveries of gas to petitioner, saying that it was not obligated to supply natural gas except for purpose of furnishing gas necessary for petitioner to fulfill the contract with Indiana Gas Utilities dated August 24, 1929, and further that since that agreement was at an end, the contract of September 1, 1935, was no longer in force. Respondent specifically reserved its right against petitioner for a claim for the minimums not taken since April 1, 1939.

On December 31, 1940, *petitioner shut the valves on its property* which were under its control and could not have been closed by respondent. Deliveries were thus terminated. Thereafter petitioner has not taken any gas from respondent.

On December 31, 1940, petitioner, through its wholly owned subsidiary, Terre Haute Gas Corporation, acquired the Terre Haute distribution system of Indiana Gas Utilities by purchase of the property from said Company under an order approved by the Public Service Commission on that date.

(c) Respondent's Argument

It is respondent's position that:

1. Respondent agreed in its contract to supply gas to petitioner for *certain purposes only*. It was not a "requirements" contract as stated by the petitioner. The purposes were to enable petitioner to supply gas to Indiana

Gas Utilities under a certain contract and after the change-over by Indiana Gas Utilities to enable petitioner to supply mixed or natural gas to Indiana Gas Utilities. *The purposes became impossible of performance when the certain contract was cancelled and Indiana Gas Utilities sold its property to Terre Haute Gas Corporation.* Respondent was not obligated, and petitioner can not demand, that gas be served for any other purposes. The contract, therefore, was terminated. December 31, 1940, was the date on which petitioner shut off the gas and also the date on which the Public Service Commission approved petitioner's purchase of Indiana Gas Utilities property by petitioner's own subsidiary. The District and the Circuit Courts properly declared all obligations terminated as of December 31, 1940. The Findings of Fact amply support this conclusion.

2. The contract required petitioner to take as a minimum 500 cubic feet of natural gas for every 1,000 cubic feet of manufactured gas sold by it. Admittedly petitioner did not take these minimums. Upon termination of the contract, petitioner became liable to respondent for damages in the amount of the difference between the contract price and the cost of production of the gas necessary to supply the minimums, which was $10,941.02. The Findings of Fact amply support this conclusion.

3. If respondent breached the contract by giving the notice of October 7, 1938, or by offering to sell gas when it merely agreed not to sell gas, or by advertising the merits of natural gas, these were acts that put petitioner to an election between continuing the contract in force or avoiding it. Petitioner by insisting that the contract re-

mained in force and accepting deliveries of gas, waived the effect of these acts as breaches and lost the right of defense to an action for petitioner's failure to take the minimums.

4. Even in a declaratory judgment action, a Court is not bound to make declarations upon issues which become moot or immaterial by virtue of decision of other issues. The question of whether petitioner made an effort to change over to mixed or natural gas was immaterial after decision by the Court that the contract remained in force until December 31, 1940.

ARGUMENT

STATEMENT OF FACTS

The statement of facts in petitioner's petition and brief is so sketchy and inaccurate that we restate all of the facts.

The facts are summarized as follows:

1. Parties

Respondent, Kentucky Natural Gas Corporation, is a Delaware corporation, with its principal office at Owensboro, Kentucky. Petitioner, Indiana Gas and Chemical Corporation, is an Indiana corporation, with its principal office at Terre Haute, Indiana. (R. 45.)

2. Respondent's Business

Respondent is engaged in producing natural gas[1] in the States of Kentucky, Indiana and Illinois, and in transporting and selling such gas in Indiana. Respondent also purchased part of its supply of gas from the line of Michigan Gas Transmission, which carried gas from the Panhandle field in Texas and Oklahoma. (R. 45, 67.)

3. Petitioner's Business

Petitioner is engaged in the manufacture of coke and by-products, including manufactured gas. Petitioner's

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[1] "Natural gas," as used herein, means gas of 1,000 B. T. U. content per cubic foot; "manufactured gas," as used herein, means gas of 570 B. T. U.'s per cubic foot, and "mixed gas," as used herein, means gas of 850 B. T. U.'s per cubic foot. Natural gas as it comes from the ground has 1,000 B. T. U.'s or more per cubic foot. Manufactured or coke oven gas is standard at 570 B. T. U.'s.

plant was located at Terre Haute. Gas manufactured was sold to a local Terre Haute distributing company, Indiana Gas Utilities Company, for distribution in Terre Haute, West Terre Haute, Clinton and Brazil (hereinafter called "Terre Haute District"). Up to September 15, 1940, petitioner also furnished manufactured gas to Universal Gas Company for transportation by it to a Loop line of Public Service Company of Indiana which also owns distributing systems in Martinsville, Bloomington, Bedford, Mitchell, Franklin, Columbus, Seymour and Greencastle, all in Indiana (hereinafter called "Loop District"). (R. 45-46.)

(a) *Indiana Gas Utilities—"Terre Haute District."* From September 13, 1935, to December 8, 1938, respondent supplied petitioner and petitioner received all of petitioner's requirements of natural gas for the purpose of producing manufactured gas furnished by petitioner to Indiana Gas Utilities Company under a contract of August 24, 1929. All such gas was furnished under the contract of September 1, 1935. Petitioner paid for all such gas at the rates stipulated in the contract. (R. 47.) During the entire period, no changeover from manufactured gas to either a mixed gas or straight natural gas was made in the Terre Haute District. (R. 55.) Gas supplied by respondent and used by petitioner from December 7, 1938, to December 31, 1940, was used for underfiring the coke ovens of petitioner, and occasionally was used for enriching gas produced by petitioner. (R. 64.)

(b) *Universal Gas—"Loop District."* Between September 13, 1935, and February 24, 1939, petitioner held all of the common stock of Universal Gas Company. Respondent held all of the preferred stock and the first mort-

gage bonds. The Board of Directors of Universal Gas, consisting of seven members, was elected three by respondent, three by petitioner, and a seventh by concurrence of both. On February 24, 1939, respondent purchased from petitioner all of the common stock of Universal and was thereafter in sole control of said Company. On September 15, 1940, Universal Gas Company substituted natural gas for manufactured gas in its service to Public Service Company of Indiana in the Loop District. This was accomplished by a new contract between Public Service and Universal. After September 15, 1940, natural gas furnished by respondent was sold through Universal to Public Service for the Loop District. (R. 47.)

4. Contract of September 1, 1935

Three contracts, all dated September 1, 1935, were entered into and approved by the United States District Court for the Southern District of Indiana in the reorganization proceedings of petitioner. One contract was between respondent and Universal, another between petitioner and Universal, and the third between respondent and petitioner. (R. 47.)

The contract between the respondent and the petitioner recited that respondent was in the business of producing, transporting and selling natural gas and desired to sell to the petitioner; that petitioner was engaged in the business of furnishing manufactured gas in the Terre Haute District "under a contract dated August 24, 1929" with Indiana Gas Utilities entered into by the predecessor of the petitioner; and that respondent contemplated entering into a new contract with Indiana Gas Utilities for the

supplying of a mixed or a straight natural gas. (R. 13-14.) The principal agreements of the parties were as follows:

> That the respondent would sell to the petitioner at the point of delivery on the pipe line of the respondent, near the limits of the City of Terre Haute, natural gas on the following basis:
>
> (a) *Pending the changeover by Indiana Gas Utilities* from manufactured gas to mixed or straight natural gas, "the entire natural gas requirements of Buyer for the purpose of producing" manufactured gas "*which Buyer is required to furnish under its present contract dated August 24, 1929, with Indiana Gas Utilities for distribution by the latter to its consumers*" in the Terre Haute District. Petitioner agreed to purchase "from Seller (in addition to all other gas required to be purchased under this Agreement) at least five hundred cubic feet of natural gas for each one thousand cubic feet of 'manufactured gas'" thus sold *to Indiana Gas Utilities.* The price fixed was 30c per M. C. F. (R. 14-15.)
>
> (b) *After changeover by Indiana Gas Utilities* from manufactured gas to mixed or straight natural gas, respondent was to supply the entire requirements of petitioner for the purpose of supplying mixed or straight natural gas "*to said Indiana Gas*

Utilities Company" for the Terre Haute District. Petitioner agreed to purchase, in addition to all other gas required, a monthly average of at least 640 cubic feet of natural gas for each 1,000 cubic feet of gas sold *"to said Indiana Gas Utilities."* The price was fixed at 30c per M. C. F. (R. 15.)

(c) *After the changeover "by said Indiana Gas Utilities"* from manufactured gas to mixed or straight natural gas, respondent was to furnish petitioner for the purpose of underfiring its coke ovens and boilers, gas for the purpose of adjusting the mixture of gas to be sold *"to said Indiana Gas Utilities"* at a price fixed. (R. 15.)

(d) The requirements of petitioner for the purpose of supplying *manufactured gas "to Universal Gas"* under a contract dated September 1, 1935. Petitioner agreed, in addition to all other gas purchased, to purchase at least 500 cubic feet of natural gas for 1,000 cubic feet of manufactured gas sold by petitioner to Universal. The price fixed was 30c per M. C. F. (R. 15-16.)

The prices were based on natural gas of 1,000 B. T. U. per cubic foot and tolerances were allowed of only 30 B. T. U.'s variance either way. (R. 16.)

Respondent agreed to maintain a pipe line from production areas to point of delivery, it being the intent and agreement

> "to provide facilities, including both pipe line and compressors adequately and *continuously to supply* sufficient natural gas at Terre Haute to supply (petitioner's) needs for natural gas, *for the purposes specified in Section First hereof.*" (R. 17.)

Respondent was not obligated

> "*to supply natural gas to (petitioner) for use or sale, either directly or indirectly, for any purpose not specified in Section First or Second hereof.* (Respondent) agrees that it will not, while this contract shall remain in force, sell gas to others than (petitioner) for consumption in or within three miles of the present City limits of Terre Haute, West Terre Haute, Brazil or Clinton. . . ." (R. 18-19.)

Petitioner agreed to maintain a holder storage capacity such as would reasonably safeguard its gas service under normal conditions, and also stated as its intention to accept from respondent "*deliveries of gas . . . in proximate uniform hourly requirements throughout each twenty-four hour day,* so far as the requirements of (petitioner's) customers will permit." (R. 19.)

It was also agreed that:

> "As soon as practicable *after the first day of each calendar month,* and not later than the 5th day, (respondent) shall furnish (petitioner) with a statement showing the quantity of natural gas delivered during the preceding month and the amount due (respondent) therefor, and (petitioner) shall

pay (respondent) the amount shown on such monthly statement on or prior to the 20th day of each month." (R. 20.)

5. October 7, 1938, Cancellation Abandoned by Respondent

(a) *Notice of October 7, 1938.* On October 7, 1938, respondent in a letter to petitioner gave notice that it elected to terminate and cancel the contract of September 1, 1935, asserting petitioner had been guilty of misrepresentations which had induced respondent to enter into the contract and that the contract was illegal and in violation of the anti-trust laws. Gas, the notice said, would be supplied only for a sufficient time to enable petitioner to replenish its coal supply and build up its labor organization to manufacture its own requirements, but that supply would in any event be discontinued in sixty days. On October 29, 1938, respondent notified petitioner that it would continue to supply gas to petitioner so long as petitioner desired such gas to mix with or enrich coke oven gas, but that after December 7th, gas would not be furnished at the low price stated in the contract but at "regularly established rates now prevailing." (R. 47-48.)

(b) *Petitioner Sues to Enjoin Cancellation.* On November 26, 1938, petitioner filed in the District Court at Indianapolis its complaint seeking to enjoin respondent from terminating the supply of gas under the contract. After receiving respondent's notice of December 2, 1938, respondent dismissed the suit without prejudice. (R. 48-49.)

(c) *Notice of December 2, 1938.* On December 2, 1938, respondent informed petitioner that it would continue to supply such natural gas as might be needed for underfiring petitioner's ovens or enriching its coke oven gas in supplying the customers named in the contract of September 1, 1935, but that after sixty days from October 7, 1938, it would not be furnished at the low price stated in the contract but at respondent's regularly established rates. (R. 48.)

(d) *Petitioner Denies Right to Cancel.* Petitioner at all times refused to recognize respondent's right to terminate the contract. Petitioner has contended at all times that respondent had no right to cancel as asserted by its various notices of October 7, October 29, and December 2, 1938. (R. 56.) At the trial of this cause, respondent offered no evidence in support of any reason for cancellation of said contract given in respondent's letter of October 7, 1938.

6. Termination of Contract on December 31, 1940

(a) *Indiana Gas Utilities Contract Ends.* Gas furnished by petitioner to Indiana Gas Utilities for distribution in the Terre Haute District was supplied under a contract dated August 24, 1929 (a contract made by petitioner's predecessor, Indiana Consumers Gas and By-Products Company). It was one of the contracts to which petitioner succeeded as a result of the reorganization. The contract contained a clause providing for cancellation within a certain time, which was extended by agreement. On or about November 18, 1939, and within the specified time, Indiana Gas Utilities served upon petitioner a notice of cancella-

tion effective one year from date. On or about August 12, 1940, petitioner delivered to Indiana Gas Utilities a letter acknowledging the effectiveness of termination of the agreement of August 24, 1929. On November 15, 1940, petitioner and Indiana Gas Utilities entered into a new contract for six months to become effective November 18, 1940. (R., 49-53.)

(b) *Respondent gives Notice of Termination.* On December 3, 1940, respondent notified petitioner that on January 3, 1941, it would cease to deliver gas to petitioner. Respondent stated that it deemed the contractual relationship with petitioner at an end on November 18, 1940, by virtue of the cancellation of the contract of August 24, 1929, between petitioner and Indiana Gas Utilities. Respondent pointed out that the obligation to the petitioner under the contract of September 1, 1935, was limited to supplying such gas as was necessary for the petitioner to carry out its contract of August 24, 1929, with Indiana Gas Utilities. The notice reserved rights already asserted in this suit which was then pending. The notice stated knowledge had just come to respondent of the cancellation of the Indiana Gas Utilities contract and that earlier notice was not, therefore, possible. The notice stated that respondent deemed its contract of September 1, 1935, no longer in force, and that petitioner might govern itself accordingly. (R. 53-54.)

(c) *Petitioner shuts off Gas from Respondent.* The lines of respondent at Terre Haute enter the property of petitioner. On the property of petitioner, there is located a valve under the control of petitioner at the end of respondent's line. Beyond this valve, there are certain meters and lines running to Universal Gas Company, to Central

Illinois Public Service Company and to petitioner's plant. A valve *under the control of petitioner* controlled the supply of gas to petitioner. This valve was closed by petitioner on December 31, 1940. Respondent could not by the closing of any valves under its control, terminate deliveries of gas to petitioner without also cutting off the supply of gas to Universal Gas Company and to Central Illinois Public Service Company. (R. 60-61.) Since said date, petitioner has received no further deliveries of gas from respondent. (R. 55.)

(d) *Indiana Gas Utilities Sell Terre Haute Property.* Indiana Gas Utilities Company on April 7, 1941, conveyed, and Terre Haute Gas Corporation (a wholly owned subsidiary of the petitioner) accepted, transfer of all of the distribution system in Terre Haute, West Terre Haute, Clinton and Brazil of the aforesaid Company. Conveyance was pursuant to an order of the Public Service Commission of Indiana *entered December 31, 1940,* authorizing former Company to sell and latter Company to purchase such property. (R. 64-65.)

(e) *No Claim for 35c Price.* Following the notice of the cancellation of the contract, and beginning with December 8, 1938, to December 31, 1940, respondent furnished natural gas to the petitioner, and regularly billed the petitioner therfor at the price of 35c per M. C. F. Petitioner paid respondent the contract price of 30c per M. C. F. for all gas so delivered. At no time has respondent had on file with the Federal Power Commission any schedule of gas rates prescribing rates for gas service at Terre Haute, Indiana, except the rates prescribed in said contract itself. The contract was on file with the Federal Power Commis-

sion prior to December 8, 1938. No claim was made on the trial by respondent for the additional 5c per M. C. F. (R. 56.)

7. Minimums Due Under Contract

(a) *Deficiencies of Petitioner's Purchases.* During the period from April 1, 1939, to December 31, 1940, petitioner did not purchase from respondent five hundred cubic feet of natural gas for every one thousand cubic feet of 570 B. T. U. gas sold by petitioner to Indiana Gas Utilities and Universal Gas. Respondent in monthly invoices claimed payment for all gas actually delivered and also for such amount of gas not actually delivered as when added to the amount actually delivered would equal five hundred cubic feet of natural gas for each one thousand cubic feet of 570 B. T. U. gas sold by petitioner to Indiana Gas Utilities and Universal Gas. Petitioner at all times refused to pay for any gas in addition to that actually received. (R. 56-57, 58.) The minimum requirements of the contract of September 1, the actual deliveries, the deficiencies and deliveries, and the amount of deficiencies in dollars at 30c per M. C. F. for the period are reflected in the following table:

	Minimum Contract Requirements	Total M. C. F. Delivered	M. C. F.	Deficiency Amount
April—1939..	40,855M	40,701M	154M	$48.05
May	40,088	39,881	207	64.15
June	36,443	36,650	.....	.....
July	36,093	36,156	.....	.....
August	36,758	36,521	237	73.53
September ..	37,968	37,415	553	172.01
October	42,009	37,375	4,634	1,436.77
November	42,857	30,889	11,968	3,725.40
December	44,591	42,107	2,484	768.15
Sub-totals for 1939	357,662M	337,695M	20,237M	$6,288.06

	Minimum Contract Requirements	Total M. C. F. Delivered	M. C. F.	Deficiency Amount
Sub-totals for 1939	357,662M	337,695M	20,237M	$6,288.06
January—1940	54,965M	49,355M	5,610M	$1,739.38
February	44,843	41,484	3,359	1,041.16
March	45,466	33,062	10,404	3,233.56
April	42,616	23,892	18,724	5,831.21
May	43,571	31,993	11,578	3,610.94
June	36,423	25,178	11,245	3,483.14
July	34,936	19,267	15,669	4,846.42
August	34,435	24,803	9,632	2,993.62
September ..	30,258	14,564	15,694	4,886.17
October	22,427	3,522	18,905	5,856.39
November	22,625	3,286	19,339	5,982.13
December	24,003	2,417	21,586	6,679.79
Sub-totals for 1940	436,568M	272,823M	161,745M	$50,183.91
Grand total	794,230M	612,518M	181,982M	$56,471.97

(b) *Previous Settlement for Minimums.* Prior to April, 1939, the quantity of natural gas purchased and paid for by petitioner under the contract in suit was substantially equal to 500 feet of natural gas for each 1,000 feet of 570 B. T. U. gas delivered to Indiana Gas Utilities and to Universal Gas as metered at Martinsville and Greencastle. But the quantity did not equal such proportion if computed upon the basis of gas delivered to Universal Gas metered at Terre Haute. Respondent claimed that in computing the minimums, meter readings at Terre Haute were to be taken, and that petitioner should pay for the minimums monthly. Petitioner denied both of these claims. On several occasions, petitioner expressed an earnest desire to adjust the differences. Based on the quantity of gas delivered to Universal Gas as metered at Terre Haute, petitioner failed between September, 1935, and February, 1939, to purchase 500 feet of natural gas for each 1,000 feet of 570 B. T. U. gas until the sum of $6,900.00 was claimed by respondent to be due. On February 24, 1939, as part of the consideration of respondent's purchase of the common stock of Universal Gas from petitioner, respondent agreed to forego all further claim for the $6,900.00. Petitioner and respondent agreed that so long as petitioner should continue to furnish 570 B. T. U. gas to Universal Gas, the minimums should be computed on metering at Martinsville and Greencastle. The table above is based on such meterings. (R. 58-59.)

(c) *Respondent's loss from petitioner's failure to take minimums.* Set forth in the table below are the figures from books of the respondent as to the cost of production, purchase, transmission, etc., of gas per thousand cubic feet, calculated upon a base of the total sales plus the minimums

under contract of September 1, 1935, which petitioner did not take. The table shows the net profit respondent would have made had petitioner taken and paid for the $56,471.97 minimums of gas set forth in the table above.

"Statement of Deficiencies to December 31, 1940, under Contract with Indiana Gas & Chemical Corporation dated September 15, 1935, Showing Average Cost of Gas.

	1939		1940	
	Average per M(1)	Amount	Average per M(1)	Amount
Deficiency—M. C. F. (Schedule 3)		20,237M		161,745M
Deficiency at contract price		$6,288.06		$50,183.91
Operating Revenue Deductions cost of gas purchased and produced	$.1692	3,424.10	$.1717	27,771.62
Exploration and development	.0176	356.17	.0088	1,423.36
Transmission expense	.0433	876.26	.0277	4,480.34
General and Administrative	.0310	627.35	.0307	4,965.57
Taxes	.0154	311.65	.0120	1,940.94
	$.2765	$5,595.53	$.2509	$40,581.83
Contract price for deficiency gas less cost of gas at average cost of all gas		$692.53		$9,602.08

Summary

1939	$692.53
1940	9,602.08
	$10,294.61 (R. 69.)

(d) *Respondent's Supply Adequate and Available.* At all times up to December 31, 1940, respondent delivered to petitioner all natural gas required by petitioner for the purpose of producing manufactured gas for delivery to Indiana Gas Utilities and to Universal Gas. Respondent at all times asserted it was not furnishing gas under its contract of September 1, 1935, except as otherwise indicated in the bill of complaint in this cause. (R. 56.) *Respondent's lines were at all times filled with natural gas under pressure at the point of delivery of gas to petitioner. Petitioner could have, at any time subsequent to September 1, 1935, taken the minimums of gas or other gas in any quantities desired. Petitioner did regulate and control the amount of gas which it took from respondent by manipulation of a valve on its property running to its plant which was under its control.* (R. 61.) At all times, respondent had an adequate supply of natural gas to meet the requirements of the contract of September 1, 1935, and sufficient to meet all demands which petitioner was entitled to make. Such supply had been arranged for by respondent in anticipation of changeover to a mixed gas or a straight natural gas for the Terre Haute territory. Respondent's supply of gas would have been sufficient to meet all of the requirements of the Terre Haute territory made by petitioner in such a circumstance under the contract. (R. 60.)

(e) *Natural Gas Not Readily Resaleable.* Natural gas is not a readily resaleable commodity. Markets for such gas are limited by the methods of transporting the gas which can only be by lines laid to the market, and further by the fact that distribution is usually accomplished through a local distributing utility which may or may not be in-

terested in or willing to supply through its distributing lines natural gas. (R. 61.)

8. Offers of Gas

On April 17, 1939, and May 1, 1939, Universal Gas wrote to Indiana Gas Utilities offering to sell natural gas and manufactured gas to Indiana Gas Utilities, both for domestic and industrial consumption. Indiana Gas Utilities never replied to these offers, and was not at the time interested in serving gas of the character and under the conditions mentioned in the letters. In the summer and autumn of 1940, respondent published advertisements in Terre Haute newspapers in which it asserted the superior advantages of natural gas as compared to manufactured gas, and advertised to the public the existence of its pipe line and the availability of gas from the pipe line for service in Terre Haute. The advertisements did not directly offer gas for immediate sale in Terre Haute. Respondent did not at the time have facilities for the distribution of gas to the public in Terre Haute. (R. 61-64.)

I.

The District and Circuit Courts properly concluded that the contract of September 1, 1935, was fully and completely terminated on December 31, 1940, and that after that date, both respondent and petitioner were wholly free of all obligations and covenants of the contract. (R. 71, 72.) (Addressed to petitioner's Questions 3 and 4.)

(a) The contract was terminated by cancellation of Indiana Gas Utilities contract and the sale of its property to Terre Haute Gas Corporation.

The contract limited the obligation of respondent to supplying gas to petitioner for the sole purpose of furnishing either manufactured, mixed or natural gas to *"Indiana Gas Utilities Company."* When on December 31, 1940, the Public Service Commission of Indiana authorized the sale of the property of *Indiana Gas Utilities Company* to Terre Haute Gas Corporation, a subsidiary of petitioner, all obligations of respondent to supply gas to petitioner under the contract were terminated by force of the terms of the agreement itself. Petitioner recognized this, for otherwise, why did petitioner shut off the gas on that day?

The terms of the contract make respondent's obligation clear. It was provided in the contract that respondent

> "Shall not be obligated to supply natural gas to (petitioner) for use or sale, *either directly or indirectly, for any purpose not specified in Section First or Second hereof.*" (R. 18-19.)

In "First" and "Second" of the contract, it is specified as follows:

> *First:* (a) *Pending a changeover by "Indiana Gas Utilities Company"* from manufactured gas to mixed gas, respondent was to supply all of the natural gas requirements of petitioner for the purpose of producing manufactured gas which petitioner "was required to furnish under its present contract dated August 24, 1929, with said *Indiana Gas*

Utilities Company.'' (R. 14-15.) It was further provided that at least 500 cubic feet of natural gas should be purchased for each 1,000 cubic feet of manufactured gas "thus sold to said *Indiana Gas Utilities Company.''* (Petitioner admits all obligation under this clause has ended. R. 75.)

(b) *After the changeover "by said Indiana Gas Utilities Company''* from manufactured to mixed or natural gas, respondent was to supply petitioner with its entire natural gas requirements "for the purpose of supplying mixed gas or straight natural gas to said *Indiana Gas Utilities Company.''* (R. 15.) Petitioner agreed to purchase a minimum of 640 cubic feet of natural gas for each 1,000 cubic feet of gas sold to "said *Indiana Gas Utilities Company.''*

(c) *After the changeover by "said Indiana Gas Utilities Company''* from manufactured gas to mixed or straight natural gas, respondent was to supply the requirements of petitioner for the purpose of underfiring its ovens and boilers and making reformed gas for adjusting the mixture to be sold to "said *Indiana Gas Utilities Company.''* (R. 15.)

(d) Clause (d) of Paragraph First has no further application, since on September 15, 1940, Universal Gas Company switched to straight natural gas, and this clause, therefore, is no longer operative. (R. 15, 16.) (Petitioner admits all obligation under this clause has ceased. R. 75.)

Second: Respondent agreed to furnish gas for industrial consumers of petitioner or "*Indiana Gas*

Utilities Company'' on contracts to be approved by respondent. (R. 16-17.) The agreements were not effective unless approved by respondent. *(Respondent and petitioner have entered into a new contract abrogating clause ''Second'' as to industrial consumers. The fact does not appear of record because the agreement was entered into subsequent to the trial. Petitioner makes no argument upon this clause either.)*

It is recited at the first of the contract that petitioner is engaged in furnishing gas to *''Indiana Gas Utilities Company''* under a contract dated August 24, 1929, and that it is contemplated a new contract will be entered into with ''said *Indiana Gas Utilities Company''* for the furnishing of either mixed or natural gas *to such Company.* (R. 14.)

When on November 18, 1940, the contract between petitioner and *Indiana Gas Utilities Company,* dated August 24, 1929, came to an end, respondent notified petitioner that it was under no further obligation to furnish gas. Petitioner concedes this as long as manufactured gas was furnished.

On December 31, 1940, Terre Haute Gas Corporation, a subsidiary of petitioner, by order of Public Service Commission, purchased the property of Indiana Gas Utilities. On that same date, petitioner shut the valves, and thereby terminated deliveries from respondent. Due to the physical arrangement of the lines respondent could not have shut off gas to petitioner without also cutting

off gas to C. I. P. S. in Illinois. (R. 60-61.) Petitioner thus had full control of deliveries.

(b) Court cannot rewrite contract.

Even if First (b) and (c) were options to take gas in the future, there is no longer any obligation on respondent because there could be no changeover to mixed or natural gas *by Indiana Gas Utilities.* Indiana Gas Utilities is no longer in business in Terre Haute. Respondent could not, therefore, be called upon under its agreement to serve gas to petitioner for the purpose of supplying such gas to Indiana Gas Utilities Company. Indiana Gas Utilities Company no longer owns the property. It is owned by petitioner's subsidiary, Terre Haute Gas Corporation. Respondent did not bind itself to furnish gas to petitioner for any purpose. When Indiana Gas Utilities ceased to exist as owner of the distribution system, then by the terms of the contract, the obligation of respondent likewise ceased to furnish gas. Respondent did not agree to sell gas to petitioner to enable it to furnish gas *to any other company.* In order to reach a different conclusion, the Court would have to strike down paragraph Sixth of the contract, and further would have to rewrite the entire agreement by striking out of clause First *"Indiana Gas Utilities Company"* where that name appears, and substitute either *"Terre Haute Gas Corporation,"* or add a phrase such as "or the purchaser of the property *of Indiana Gas Utilities Company."*

We submit that the contract was at an end when it became impossible by Indiana Gas Utilities' transfer of its property to Terre Haute Gas Corporation for petitioner to take gas for the purposes stated in the agreement.

(c) The contract required continuous deliveries.

Wholly apart from the foregoing point, the contract otherwise clearly indicates that it must be construed as having been terminated on December 31, 1940.

The contract contemplated a continuous performance by both parties. The contract is for the *sale of natural gas* and not an *option to purchase*. (R. 13.) In the third recital clause, it is stated that petitioner contemplates entering into a new contract for the furnishing of mixed or natural gas to Indiana Gas Utilities. There was never to be a lapse of time between deliveries. No option was granted. Clause First sets up the conditions under which gas is to be delivered to petitioner. They follow in such order. Thus, "pending *the changeover*" and "after *the changeover.*" (R. 14-15.) *The changeover* referred to is the one stated in the recital clause of the contract. (R. 14.) In the shift from delivery of manufactured gas to delivery of mixed or natural, there was to be no interruption of deliveries by respondent. Only the price and the minimums were to change.

Respondent agreed to maintain equipment adequate to "continuously" deliver sufficient gas to petitioner. (R. 17.) Petitioner agreed to maintain equipment making possible delivery of gas by respondent in proximate *uniform hourly installments*. (R. 19.) Respondent agreed to maintain a constant delivery pressure. (R. 19.) There was to be regular monthly billings for the gas delivered. (R. 20.) It was agreed that respondent and petitioner would maintain facilities and equipment "in such manner as will make possible *a continuous supply of gas hereunder.*" (R. 20.)

A continuous delivery of gas was contemplated under all of the provisions of the contract. It was the continuous delivery of gas that was the consideration for respondent's agreement to refrain from the sale of natural gas in the Terre Haute territory. In fact, this is so expressed. Respondent was "while this contract shall remain in force" not to sell gas to others in a defined territory. (R. 19.)

Construction of the contract as creating an option after the changeover ignores the wording of the contract. The argument that respondent had given up until 1947 competition for the Terre Haute market, with no compensation, either by way of payment of consideration for an option or an agreement to regularly take gas, ignores wholly the provisions of the contract.

All of the ultimate facts which support this conclusion are in the record as indicated. This Court need, therefore, not heed the alleged error based upon the Circuit Court's statement that it must assume that the "evidence" not in the record "justified the finding."

We submit that the agreement contemplated a continuous delivery of gas; that the contract was one of sale requiring regular deliveries of gas; that it was not and can not be construed to be an option to purchase at some future date; therefore, the decree properly declared the contract terminated on December 31, 1940. The Circuit Court on the Record did properly affirm this ruling. No review is warranted on certiorari.

II.

The District and Circuit Courts properly concluded that the petitioner was liable to the respondent for damages for failure to take the minimums provided for in the contract and properly assessed damages. (R. 72, 73.) (Addressed to petitioner's Questions 1 and 2.)

(a) Petitioner failed to take or pay for minimums provided for in contract.

The contract required petitioner to take from respondent a minimum of 500 cubic feet of natural gas for each 1,000 cubic feet of manufactured gas sold by it. When the contract terminated on December 31, 1940, respondent had failed over a period from April 1, 1939, to take the minimum by 181,982 M. cubic feet. (R. 14-15.) At the contract price of 30c, the total deficiency represented $56,471.97. (R. 57.) Respondent had each month billed petition for the minimum not taken. Petitioner had paid on the billings only for the gas actually taken, and refused to pay for any additional gas. (R. 57-58.) There had been a dispute prior to April 13, 1939 between respondent and petitioner over the minimums. Respondent for twenty-nine months prior to that date had billed petitioner for the minimums, and petitioner had failed to pay. The dispute was as to what meter should be accepted as determining the base for the minimum—whether the gas should be metered at Terre Haute or at the ends of the Universal line at Greencastle and Martinsville. In other words, the dispute was as to whether the line loss between Terre Haute and the delivery points to Public Service Company of Indiana should be

accepted as the base for fixing the minimum. (R. 58, 15-16.)

The dispute was settled. It was agreed by the parties more than four months after the first notice of cancellation, that as long as manufactured gas was furnished to Universal, metering should be at Martinsville and Greencastle —in other words, the respondent accepted the line loss. (R. 59-60.) The minimums involved here were calculated upon the agreed basis. (R. 58.)

Petitioner admits failure to take all required by contract, but denies it was required to purchase any certain amount during any particular period. Petitioner admits in its answer liability for the minimums matured when the contract ended, and that petitioner was then liable *"to pay such damages as respondent might have suffered by reason of petitioner's failure during such term to purchase the entire minimum quantity of gas required."* (R. 32.)

The admission in the answer and the recognition of the obligation in the letter of February, 1939, with reference to the minimum settlement, alone constitute sufficient support for the Court's ruling. Support is also found in the authorities. *Petitioner was not entitled to gas from respondent except under a contract.* When petitioner refused to accept respondent's notice of cancellation as effective and to agree to a higher price, and continued to take gas *"under the contract"*[2] and pay for it at the contract price, the contract was continued in force.

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[2] For one full year after the notice, October, 1938, to October, 1939, petitioner took all the gas that the contract required except small amounts in the months of April, May, August and September, 1939, when petitioner fell slightly behind the minimums. (R. 57.)

If the contract remained in force, petitioner, as well as respondent, was bound by its terms. Respondent could at any time have abandoned its notice of cancellation, for petitioner had never acquiesced in it and had never changed its position that the contract was in force. When the complaint was filed in July, 1940, petitioner knew that respondent was asserting this alternative right under the contract.

If the contract was terminated on December 31, 1940, then it follows, on petitioner's admissions, that petitioner is liable to respondent for damages resulting from the failure to take the minimums.

(b) Respondent's damages difference between contract price and cost of production of gas.

At all times there was a sufficient supply of gas available at the end of the line of respondent on the property of petitioner. *It was within the power of petitioner to take these minimums, or, for that matter, to take any quantity of gas which it desired.* The situation exists even today. It should be obvious that respondent has lost the advantage of the use of $56,471.97. The Court can not presume that respondent will sell all of its gas, because as it appears from the evidence, natural gas is not a readily resaleable commodity. (R. 61 and cf. *Griffin v. Oklahoma Natural Gas Corp.* (10 C. C. A. 1930), 37 F. (2d) 545, 550). The only credits which petitioner can claim against the contract price are the costs of production of the gas to supply the minimums and the cost of trans-

portation. These costs on the basis of the annual average costs of respondent in 1939 and 1940 were $46,177.36, leaving $10,294.61, which is the actual loss suffered by respondent due to petitioner's failure to take and pay for the minimums.

Petitioner admitted liability for the minimums on the termination of the contract. In its answer, petitioner states that liability to take the minimums

> "could not mature until the expiration of the term of the contract, *and, when matured, would render defendant liable only to pay such damages as plaintiff might have suffered by reason of defendant's failure during such term to purchase the entire minimum quantity of gas required,* and could by no means be the basis of a claim for the entire agreed purchase price of gas not received by defendant." (R. 32.)

The proper measure of damages is that allowed in the case of a contract to manufacture goods, produce coal, ore or lumber. The goods must be produced before they can be sold, and the loss, therefore, to seller is what he might have made in the way of profits. Damages should be calculated on the basis of the contract price less the cost of production.

Hinkley v. Pittsburgh Bessemer Steel Co. (1886), 121 U. S. 264, 275;

Brunswick-Balke-Collender Co. v. Wisconsin Mat Co. (7 C. C. A. 1928), 24 F. (2d) 78, 79;

W. J. Holliday & Co. v. Highland Iron, etc., Co. (1909), 43 Ind. App. 342;

Rochm v. Horst (1900), 178 U. S. 1, 20, 21;

Skeele Coal Co. v. Arnold (2 C. C. A. 1912), 200 Fed. 393, 395;

Yates v. Whyel Coke Co. (6 C. C. A. 1915), 221 Fed 603, 607;

Indiana Canning Co. v. Priest (1896), 16 Ind. App. 445.

The ultimate facts as to cost of production of gas and all other facts necessary to determine the respondent's damages are in the record (R. 69-71, 56-58) as a part of the Findings of Facts. The Circuit Court reached a proper conclusion. There are no other facts not in the findings necessary to support it. So this Court should deny the petition for certiorari.

III.

The Court properly concluded that respondent was entitled to judgment and to recover damages, for petitioner was bound to elect either to waive or stand on respondent's breaches, if any, and petitioner elected to waive the breaches. (R. 71.) (Addressed to petitioner's Questions 3 and 4.)

(a) Petitioner after respondent's notice of cancellation was bound to elect to treat contract as cancelled or in force.

It is asserted that respondent breached the contract when it gave the notice of October 7, 1938; that respondent's advertisement of the value of natural gas (R. 64), and the offer of Universal to sell gas to Indiana Gas Utilities (R. 61-64), were also breaches of contract, as was the billing of gas at 35c; that these alleged breaches of contract prevented a recovery of damages against petitioner for its breach of contract in failing to take the minimums. The acts were not breaches of contract. Respondent has substantially performed the principal covenants of the agreement. It had gas under proper pressure at the valve on petitioner's property at all times. It had an ample supply of gas. Although it billed the gas at 35c, it was regularly paid at the contract price of 30c by petitioner. Petitioner at all times asserted the contract remained in force.

Petitioner's argument overlooks a well-settled principle of the law of contracts that where one party to a bi-lateral contract not yet wholly performed by either party violates the terms of the contract, the other party then is put to the election of relying upon the breach or insisting on performance. If further performance is accepted by the other party, the breach is waived. It may no longer be relied upon either as a cause of action or as a defense to an action. Both parties are wholly bound by it. Petitioner, after all of these asserted breaches, not only regularly accepted deliveries of gas, but at all times insisted that respondent was bound by the contract. This con-

stitutes an election on the part of petitioner and a waiver of any excuse which petitioner might have had for failing itself to perform the contract. That such is the law is abundantly clear. The rule is stated in the American Law Institute's Restatement (Restatement of the Law of Contracts, Sec. 309), and is supported by authority.

Mr. Justice Holmes in *Bierce v. Hutchins* (1907), 205 U. S. 340, 346, said:

> "Election is simply what its name imports; a choice, shown by an overt act, between two inconsistent rights, either of which may be asserted at the will of the chooser alone. . . . *He may keep in force or may avoid a contract after the breach of a condition in his favor.*"

Also, to the same effect:

Conway, et al. v. White (1925) (2 C. C. A.), 9 Fed. (2d) 863, 870;

Mortgage Underwriters v. Stuckey (1940), 108 Ind. App. 83, 90;

Pitts, Administrator v. Pitts (1863), 21 Ind. 309, 313;

Williston on Contracts, Revised Ed., Vol. 3, Sec. 688.

(b) Petitioner has waived breach, if any, of respondent, and contract remained in force to December 31, 1940.

When petitioner elected to waive respondent's breach, if any, and accepted further deliveries, the contract was kept alive for the benefit of both parties. It would be strange indeed if this were not the law, for otherwise petitioner might assert the contract remained in force as to those parts beneficial to it, and as to those beneficial to the other party that the contract was of no force. It is the law that it takes two to make a contract, and it likewise takes two to unmake a contract. Respondent's attempted repudiation of the agreement not concurred in by petitioner did not terminate the agreement. Petitioner could have concurred in this repudiation and the agreemnt would have been terminated. Petitioner did not follow this course, but took the other course of asserting the contract was in force, and in force it must have remained until December 31, 1940.

The law is settled that the attempted repudiation by petitioner of the agreement, if not an actual breach, might be an anticipatory breach, but still, regardless of its character, petitioner was bound to choose his course. In *Rochm v. Horst* (1899), 178 U. S. 1, 11, the Supreme Court said of such a repudiation:

> ". . . The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of nonperformance; *but in that case he keeps the contract alive for the benefit of the other*

> *party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party, not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstance which would justify him in declining to complete it.* On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from the nonperformance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss." (178 U. S. 11.)

Courts without discussion or citation of authority have accepted the rule announced in *Roehm v. Horst.* In the case of *Hanging Rock Iron Co. v. Root Co.* (1926), 10 F. (2d) 154, the Seventh Circuit Court of Appeals said:

> "It needs no authority to support the proposition that a breach, not persisted in, and *not accepted or relied upon by the opposite party,* is of no consequence."

In this case, the breach has not been persisted in by respondent, for gas has been delivered, and except for the request of alternative relief in the way of recovery at the higher price, there have been no acts by respondent inconsistent with the contract, for respondent was only bound not to sell gas in Terre Haute—but not advertise its value.

Legion are the authorities which support *Roehm v. Horst.* We cite only some of the cases.

Roller v. Leonard & Co. (4 C. C. A.), 229 Fed. 607, 615;

Hettrick Mfg. Co. v. Waxahachie Cotton Mills (6 C. C. A.), 1 F. (2d) 913, 919;

Johnson v. Wright (Minn.), 220 N. W. 946, 947;

Independent Milling Co. v. Howe Scale Co. (Kan.), 181 Pac. 554, 555;

Holmes v. Racine Furnace & Foundry Co. (Wis.), 200 N. W. 647, 648;

McCormick v. Fidelity & Casualty Co. (Penn.), 161 Atl. 532, 533-534.

In this last case, the Court goes so far as to state:

> ". . . Many authorities hold, and so far as we are aware there are none to the contrary, that, whenever the unequivocal act of one of the parties evidences an intent not to fulfill his executory agreement at the time specified in it, the other party may, if he does so promptly and unequivocally, accept such breach and sue at once; but, until he does accept it, the act operates as a tender only. *If he does not promptly and unequivocally accept the tender, the contract remains in full force and effect according to its terms, for the benefit of both parties to it.*" 161 Atl. 533.)

It was suggested by petitioner that the Uniform Sales Act had changed the law as declared in *Roehm v. Horst,* 178

U. S. 1, and other cases cited. Sec. 58-202, Burns' 1933, cited by petitioner (Respondent's petition, pp. 13-14) is the only Section which it is suggested changes the rule. This Section does not change the rule because—

(a) It does not apply to a case like this one. It merely provides that delivery of goods and payment of price are concurrent conditions *"unless otherwise agreed."* It was otherwise agreed here. Clauses 10th and 15th of the contract control. (R. 20, 22.) Payment of the price is specifically made a condition subsequent and not a *"concurrent condition."* The Section, therefore, has no application.

(b) Furthermore, the Section only *"expresses rules of the common law,"* and therefore makes no change in the law. (*Williston on Sales,* Second Ed., Sec. 447.)

(c) No cases have been cited, nor have any been decided under this Section of the Uniform Sales Act (Section 42) applying it to a situation like this one, in which petitioner after notice of cancellation of contract, continues to take the goods under the contract and pay for them at the contract price. (cf. Uniform Laws Annotated, Vol. 1—Sales Act—Sec. 42, and cases cited, pp. 216-221.)

(d) At the most, all Section 42 of the Sales Act requires before a seller may recover under the contract, is a tender of the goods making it possible for buyer to take delivery. Here *there was a constant tender of goods. Gas was at petitioner's valves at all times in ample amounts and under adequate pressure so that petitioner could have not only taken the minimums but all the gas it desired.* (R. 61.)

It is apparent that the rule stated in *Roehm v. Horst* and other cases cited in respondent's brief, has not been changed

by the Sales Act. Counsel has examined all of the 174 cases in which *Roehm v. Horst* has been favorably cited by Federal Courts. In scores of those cases, decisions were rendered after the Uniform Sales Act had been adopted in the State in which the controversy arose. In no case, so far as counsel have been able to ascertain, is Section 42 of the Sales Act, or any other Section of the Sales Act, referred to, but in all, the principle of *Roehm v. Horst* is reaffirmed. For example, in *Cox & Sons Co. v. Crane Iron Works* (3 C. C. A. 1925), 5 Fed. (2d) 314, 315, which involved a contract under the laws of New Jersey, where the Sales Act had been in force for eighteen years prior to the controversy, the Court said of defendant's refusal to perform:

> "In the first place, the seller had (a) the option of accepting the breach by the defendant, as a cancellation of the contract by it, and of placing plaintiff in the position of one whose contract has been wrongfully repudiated before the time of performance has arrived; or it had (b) the option of standing on the contract and declining to accept its tendered cancellation. *If it followed the latter course, declined to accept the cancellation, and stood on the contract, its duty, of course, was to do its part toward the fulfillment of its part of the contract, which it was insisting was in force.*" (315)

Similar statements of law, by virtually every Federal Court in the land, both before and after the Sales Act, could be added.

Nothing in the cases cited in the brief of petitioner is to a contrary effect. In every one of the cases cited, the repudiation was treated as a breach and action taken by the

party to whom the notice of repudiation had been given. Also, in all of the cases, there was a refusal of either buyer to accept the goods or seller to deliver them, after either the buyer or the seller had received the notice of repudiation. *In othr words, in each of these cases, buyer or seller elected to treat the notice of cancellation as a repudiation of the contract, and asserted such rights as resulted from that election.* Here the contrary course has been taken. Buyer has elected to treat the contract as in force. Buyer has not sued for any damages that might have resulted from the notice. We do not say that in a proper action, or even on a counterclaim, that petitioner might not have been awarded damages, to the extent that he could prove them, for the notice if it were wrongfully given, but petitioner has made no such claim. What we do say is that we have found no case, and none has been cited to the effect that after buyer has elected to treat the contract as remaining in force, and has waived its right to treat the contract as repudiated, that it can defend an action to enforce the agreement which it has all along asserted was in force.

On this point, we conclude that petitioner having elected to accept the position that the repudiation of respondent was wrongful and that the contract was in force, the contract thus remained in force and must be performed according to its terms by both respondent and petitioner.

Now to the cases cited by petitioner. In the English case of *Ripley v. McClure* (1849), 4 Exch. 345, buyer repudiated his contract and seller, without making a tender, sued for breach of the contract. It was held, and properly so, that seller had a right of action, and that it made no difference that buyer had offered to accept the goods under a previous

contract which had been cancelled by both parties. This case is not authority in a case like the present one where *buyer did accept the goods and did pay for them at the contract price!*

The next case cited is that of *Lagerloef Trading Co. v. American Paper Products Co.* (C. C. A. 7), 291 Fed. 947. In this case, seller performed his part of the contract, but buyer repudiated it and indicated that he was not willing to accept deliveries under the contract. Thereupon, seller brought an action to recover for the breach of contract. The Court pointed out that seller's action in bringing suit converted the anticipatory repudiation into a breach for which the seller was entitled to recover. In this case, however, no action has been brought by petitioner upon the breach.

The next case cited is that of *Tri-Bullion Smelting & Development Co. v. Jacobsen* (C. C. A. 2), 233 Fed. 646. Again in this case, there was a repudiation of a contract by seller, and although buyer wrote a letter saying that the contract should be performed, still buyer brought suit for damages for the breach of the contract. The Court held that the mere fact that buyer had urged performance did not excuse seller, and that the buyer had a right of action. But here again, there is a different situation. *Here no action has been brought by the petitioner!*

In *Bu-Vi-Bar Petroleum Corp. v. Krow* (C. C. A. 10), 40 Fed. (2d) 488, 491, the Court states the rule that a party is bound to elect between the course of rescission or continuing the contract in force. The party in that case did elect to treat the breach as a repudiation of the contract.

In *United States Press Assn. v. National Newspaper Assn.* (C. C. A. 8), 237 Fed 547, buyer notified seller that it

would not proceed further with its contract. Seller rendered service for a short time while negotiations were pending, but subsequently brought an action for damages and loss of profits, and was permitted to recover for the breach. The illuminating part of the case is that the Court undertook to state the entire rule relating to anticipatory repudiation, and the second part of the rule, which is italicized in the following quotation, is the one which is directly applicable to this case and supports squarely the position of respondent.

We quote from the case:

> ". . . It is well settled that where one party repudiates a contract, and refuses longer to be bound by it, the injured party has an election to pursue one of three remedies: First, he may treat the contract as rescinded, and recover upon quantum meruit so far as he has performed; *second, or he may keep the contract alive for the benefit of both parties,* being at all times himself ready and able to perform, and at the end of the time specified in the contract for performance sue and recover under the contract; third, or he may treat the repudiation as putting an end to the contract for all purposes of performance and sue to recover so far as he has performed, and for the profits he would have realized if he had not been prevented from performing." (237 Fed. 553.)

The difficulty in petitioner's position is not with the authorities. In fact, the authorities are entirely consistent with those cited by the respondent. Petitioner's difficulty is that it elected to keep the contract alive, and even now is asking a declaration that the contract remain alive. If

petitioner had taken the contrary position, then, of course, it could have availed itself of the respondent's breach, if any.

IV.

The Court did properly dispose of all issues tendered by the pleadings. (R. 71.) (Addressed to petitioner's Questions 5 and 6.)

The Court concluded that the law was with respondent, that the contract was fully terminated, and that respondent was entitled to damages. (R. 71.) The conclusion of the District Court, affirmed by the Circuit Court of Appeals, necessarily determined that the attempted cancellation on October 7, 1938, by respondent was of no force and could not be relied upon by petitioner as a defense. Under the Court's construction of the agreement, as applied to the facts, it was wholly immaterial for the Court to make any declaration as to whether petitioner did or did not make an effort to change over to mixed or natural gas. The respondent's notice of October 7, 1938, stands now as given without justification since respondent did not support it with the necessary evidence. How could it add one jot or tittle to the case for the Court to have found that petitioner did make an effort to change over, since this would only further indicate that the notice of October 7, 1938, was given without justification? The breach, if any, in giving the notice has been waived.

The leading authority on the subject of declaratory judgments summarizes the numerous cases on the subject

as follows: There is no ground for declaratory judgment where there is "no actual, genuine, live controversy, the decision of which can definitely affect existing legal relations." (*Borchard Declaratory Judgments* (1934), pp. 58-59.) When the respondent no longer relied upon the notice of October 7, 1938, there ceased to be any "controversy" between the parties.

CONCLUSION

We respectfully conclude that the District and Circuit Courts' decisions are sound and that the petition for certiorari should be denied.

Respectfully submitted,

HARRY T. ICE,

MERLE H. MILLER,
951 Consolidated Building,
Indianapolis, Indiana.
Attorneys for Respondent.